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EDITED BY

EDMUND H. BENNETT AND CHAUNCEY SMITH,

COUNSELLORS AT LAW.

VOLUME XXIV.

Containing cases in the House of Lords, the Privy Council, the Courts of Common Law, and the Admiralty and Ecclesiastical Courts, during the years 1853-54.

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A

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ARGUED AND DETERMINED

IN THE

HOUSE OF LORDS,

DURING THE YEAR 1853.

ANDERSON, Appellant, FITZGERALD, Respondent.¹

July 4 and 14, 1853.

Life Insurance — Warranty — False Statement — Materiality.

F. proposed his life for insurance, and signed a form of "proposal," which contained his answers to twenty-seven questions, the 21st and 22d of which were as follow: "21. Did any of the party's near relations die of consumption, or any other pulmonary complaint? Answer, No. 22. Has the party's life been accepted or refused at any office, &c.? Answer, No." The proposal also contained the following agreement: "I hereby agree that the particulars mentioned in the above proposal, shall form the basis of the contract between the assured and the company; and if there be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to this insurance shall not have been fully communicated to the said company, or there shall be any fraud or misstatement, all money which shall have been paid on account of this insurance, shall become forfeited, and the policy be void." The policy contained a warranty on the part of F. as to most of the facts replied to in the proposal, but not as to questions 21 and 22. It then provided that the policy should be null and void, and all moneys paid by F. forfeited, upon F. dying in certain enumerated modes, "or if any thing so warranted as aforesaid shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed and communicated to the said company, or if any fraud shall have been practised upon the said company, or any false statement made to them in or about the obtaining or effecting

¹ 17 Jur. 995. Error from the Exchequer Chamber in Ireland. Before the Lord Chancellor, (Lord CRANWORTH,) Lord BROUGHAM, and Lord ST. LEONARDS, assisted by the learned judges, PARKE, PLATT, ALDERSON, and MARTIN, Bs.; COLERIDGE, WIGHTMAN, WILLIAMS, ERLE, CRESSWELL, TALFOURD, and CROMPTON, Js.

Anderson v. Fitzgerald.

of this insurance." Upon an action on the policy against the company, it appeared that the answers to questions 21 and 22 were not true:—

Held, reversing the decisions of the Courts of Exchequer and Exchequer Chamber in Ireland, that the judge was wrong in directing the jury, that if they found the statements both false and material, they should find a verdict for the defendant; and that the questions which the judge ought to have left to the jury were, first, were the statements false; and, secondly, were they made in obtaining or effecting the policy.

Observations on the form of this policy, and its ambiguity, and the effect of making some of the statements in the proposal matters of warranty. Per Lord St. Leonards.

A bill of exceptions should state what directions the judge gave on the particular issue raised, as it is misdirection, not non-direction, which is the proper subject of a bill of exceptions. Per the judges.

THIS was a writ of error on a judgment of the Exchequer Chamber in Ireland, which affirmed a judgment of the Court of Exchequer in Ireland, on a bill of exceptions for misdirection. The case is very fully reported in 1 Ir. Law Rep. 251. It was an action of assumpsit on a policy by the personal representative of the assured, against one of the directors of the United Kingdom Life Assurance Company. The facts were shortly these:—Patrick Fitzgerald, being desirous of effecting an insurance on his life for 450*l.*, applied to the agent of the above company at Limerick, from whom he obtained a printed "proposal for insurance." This proposal was dated "Kilrush, 17th June, 1846," and contained twenty-seven questions relative to the age, state of health, past and present, and habits, &c., of the party whose life was proposed, and also as to the health of his parents and near relations, &c. The 21st and 22d questions and answers were as follow: "21. Did any of the party's near relations die of consumption or any other pulmonary complaint? Answer. No. 22. Has the party's life been accepted or refused at any office; and if accepted, was it at the usual premium, or with what addition? Answer. No. The proposal also contained the following undertaking, which was signed by Patrick Fitzgerald, and attested:—"I hereby agree that the particulars mentioned in the above proposal, and which may be stated by the referee above or hereunder mentioned, as the case may be, shall form the basis of the contract between the assured and the company; and if there be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to this insurance shall not have been fully communicated to the said company, or there shall be any fraud or misstatement, all money which shall have been paid on account of this insurance shall become forfeited, and the policy be void." The answers were considered satisfactory by the office, and the policy, bearing date the 8th August, 1846, was accordingly issued, and so far as it is necessary to state, was as follows:—"Whereas Patrick Fitzgerald, of Kilrush, in the county of Clare, Ireland, nursery-man, is desirous of making an assurance with the United Kingdom Life Assurance Company in the sum of 450*l.* upon his own life, and hath warranted, and doth warrant, that his name, residence, and profession, business, or occupation are as above stated, and that his age will not exceed fifty-two years on his next birthday; that he is not employed in military, or naval, or preventive service; that he has had the small-pox, that he has not had the cow-pox, and that he has not had the

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gout; that he has not been nor is subject to or afflicted with rupture, fits, or convulsions since childhood, asthma, insanity, or spitting of blood; and that he is not afflicted with an habitual cough, or any disease or disorder tending to the shortening of life; and that he has led and continues to lead a temperate life; and that he has a sound and good constitution, and is now in a good state of health.”¹ The policy then recited the payment of the first year’s premium, and contained the usual undertaking on the part of the company to pay the amount insured. It then contained the following proviso:—“Provided always, that in case the said Patrick Fitzgerald shall die upon the high seas, unless in passing in decked vessels in time of peace from one part of Europe to another, or shall go beyond the limits of Europe; or shall enter into or engage in any active military or naval service, or the preventive service, without previous license from the board of directors of the said company for that purpose; or shall kill or destroy himself, or cause his own death, whether *felo de se* or otherwise, or die by duelling or by the hand of justice; or if any thing so warranted as aforesaid shall not be true; or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed and communicated to the said company; or if any fraud shall have been practised upon the said company, or any false statement made to them in or about the obtaining or effecting of this insurance, this policy shall be null and void, and all moneys paid by or on behalf of the said Patrick Fitzgerald on account of this insurance shall become forfeited.” Patrick Fitzgerald died on the 8th December, 1846, and the company refused to pay the sum insured. Action by the personal representative of Patrick Fitzgerald. Averment of the truth of all matters warranted, and that no matters material to the insurance had been mistated or misrepresented, &c., in or about the obtaining or effecting the insurance. Defence—first, general issue; and various other pleas. Second plea, *actionem non*, because that before the executing the said policy, to wit, on the 17th June, 1846, Patrick Fitzgerald made a statement to the company in or about the effecting of the policy, to wit, a declaration in writing setting forth several of the statements therein made by him in reference to his state of health, medical attendants, health of his near relations, and as to whether he had been accepted or refused at other offices, and setting forth the undertaking at the foot thereof; and it averred that the statement and declaration was false, and contained an untrue and unfaithful representation of the facts, in this, amongst others, that several of his near relatives had died of consumption, and that he had been accepted at divers insurance offices. The third plea set forth a statement made by Fitzgerald to the medical officer, which was to the same effect as the statements in the proposal, and it averred that this statement was false.

¹ This was a recapitulation of some, but not all, of the answers to the questions contained in the above “proposals for insurance.”

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At the trial of the case at the spring assizes of 1848, for the county of Limerick, before Ball, J., the plaintiff gave the usual proofs, and put in evidence the "proposal for insurance," dated the 17th June, 1846. Several witnesses were examined by the defendant, whose evidence proved that several of the answers to the questions in the "proposal" were false; amongst others, his answer that he had not been insured at any other office, and also his answer as to the health of his near relations, it having been proved that two of his sisters died of consumption. Counsel for the defendant called upon the judge to direct the jury, that if they believed that prior to the making of the policy any false statement had been made to the company by Patrick Fitzgerald in or about the obtaining or effecting of the insurance, although material to the insurance, they should find a verdict for the defendant on the first plea; but the judge refused so to direct the jury. This was the ground for the first exception. Secondly, the defendant's counsel called upon the judge to direct the jury, that if they believed that before Patrick Fitzgerald signed the "proposal" of the 17th June, 1846, he had been refused to be insured at the offices of other insurance companies, and that his answer in that behalf was a false statement made by him to the company in or about the obtaining of the insurance, they should find a verdict for the defendant, although the jury should think that such false statement was not material to the insurance. But the judge refused so to do, and directed the jury to consider whether they believed the statement, that the life of Patrick Fitzgerald had not been, previously to the proposal, refused to be insured at the offices of other companies, to be false; and if false, whether they believed such false statement to be material to the insurance; and if they believed the same to be both false and material, they should find a verdict for the defendant on the said issue. The jury found for the plaintiff. The exceptions did not state what directions the judge gave the jury as to the issue joined on the second and third pleas. The exceptions were argued in the Court of Exchequer in Michaelmas Term, 1849, and that court overruled the exceptions; Lefroy and Richards, BB., being for overruling, and Pigot, C. B., for allowing. A writ of error to the Exchequer Chamber was brought on that judgment, when that decision was affirmed, Moore, J., Lefroy, B., Ball, J., Perrin, J., Torrens, J., Pennefather, B., and Blackburne, C. J., being for affirming; and Jackson, J., Pigot, C. B., and Monahan, C. J., for reversing. On that decision the present writ of error was brought.

F. Kelly, and *Bovill*, for the plaintiff in error.

Napier, and *Fitzgerald*, (of the Irish bar,) for the defendant in error.

The following authorities were cited:—*Duckett v. Williams*, 2 Cr. & M. 348; *Geach v. Ingall*, 14 M. & W. 95; *Pawson v. Watson*, (in note to *Bean v. Stupart*, 1 Dougl. 12; also Cowp, 785); *Scanlan v. Scales*, 6 Ir. Law Rep. 367; and *Borradaile v. Hunter*, 5 Scott's N. R. 419.

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At the conclusion of the arguments the following questions were put for the opinion of the judges :—

1. Was it necessary for the plaintiff in error to prove on the trial that the answers given by Fitzgerald to questions 21 and 22, contained in the particulars dated Kilrush, 17th June, 1846, or either of them, were or was material as well as false?

2. If it was necessary for the plaintiff in error to prove the materiality as well as the falsehood of the answers, or either of them, are the exceptions, so far as they relate to the ruling of the learned judge on the issues joined on the second and third pleas, or either of them, sustainable?

PARKE, B., on behalf of the judges, requested time to consider.

July 4. PARKE, B., now delivered the unanimous opinion of the judges as follows:— Your lordships have proposed two questions for the consideration of those of her Majesty's judges who heard the argument of the case at your lordships' bar. The first is, " Was it necessary for the plaintiff in error to prove on the trial that the answers given by Fitzgerald to questions 21 and 22, contained in the particulars dated Kilrush, 17th June, 1846, or either of them, were or was material as well as false?" I have to state, that we have considered with due attention the very able arguments both at your lordships' bar and in the judgments of the Irish judges, which are fully reported in the printed cases laid before us, and that we find ourselves unable to agree in the conclusion at which the majority of those judges have arrived. The answers referred to by your lordships were given to two questions put to the assured, Fitzgerald; the first, whether any of the party's near relatives died of consumption or other pulmonary complaint? and, secondly, whether the party's life had been accepted or refused at any other office; and if accepted, whether at the usual premium, or with what addition? To both the assured answered in the negative. At the end of the list of questions the assured subscribed a declaration to the effect that the particulars should form the basis of the contract between the assured and the company, and that if there were any fraudulent concealment or untrue allegation contained therein, or any circumstance material to the insurance should not have been fully communicated to the company, or if there should be any fraud or misstatement, all the money paid on account of the insurance should be forfeited, and the policy should be void.

The first question, then, submitted to us is, whether it was necessary for the plaintiff in error to prove on the trial that the above answers, or either of them, were or was material as well as false?

We are all of opinion that it was not. This question does not appear to us to turn upon the well-known distinction between warranties and representations laid down by Lord Mansfield, nor upon the point whether the declaration above mentioned was either a part of the contract binding between the parties irrespective of the policy, or meant to be referred to by it. The proviso is clearly a part of the express contract

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between the parties, and, on the non-compliance with the condition stated in the proviso, the policy is unquestionably void.

The case, therefore, resolves itself, in our view of it, as it does in that of most of the Irish judges, simply into a question of the construction of the proviso itself; and it is upon questions of that nature that different minds are apt to differ in their conclusions, however disposed to adopt the established rules for the construction of written instruments. By that proviso it is stipulated, first, that if the assured should die on the high seas, (with certain exceptions,) or should kill himself, or die by duelling, &c., or if anything warranted as before mentioned (and there were several express warranties before stated) should not be true, or if any circumstance material to that insurance should not have been truly stated, or should have been misrepresented or concealed, or should not have been fully and fairly disclosed and communicated to the company, the policy should be void. Thus far the condition applies only to material matters; but it proceeds to declare, obviously with a view of extending the protection of the office still further, that if any fraud shall have been practised on the company, or any false statements made to them, in or about the obtaining or effecting of that insurance, the policy shall be null and void. The latter words probably override the former; and the fraud, as well as the false statement, in order to avoid the policy, must be made in or about the obtaining or effecting of that insurance. These words, no doubt, must be understood not to include a false statement of matters to the disparagement of the applicant for insurance, and tending to render his life less insurable; such a construction would be clearly absurd, and in no way reconcileable with the manifest object of the proviso. The words, however, will clearly include all frauds or false statements made in order to obtain the policy, whether in matters material or not: a consistent construction will thus be given to the whole. The proviso, in the first place, provides for the violation of the special matters mentioned in the commencement of it. Next, it requires every material fact not to be misrepresented or concealed, but to be fully and fairly declared. But it goes further. In the anxiety of the company to protect itself by every precaution, it prohibits any fraud or falsehood whatever to be used in obtaining the insurance. It includes all frauds for that purpose, though not made by concealment or misrepresentation, by word or writing, of material facts, such as fraud in false personation, or in the disguise of the diseases of the applicant; and, lastly, it prohibits every false statement whatever, whether in matters actually material or immaterial, and leaves no room for dispute whether the particular matter to which it related was material or not, (which in the case of a dispute a jury would have to decide,) leaving the company to determine entirely for itself what matters it deems material, and what not. This seems to us to be the obvious ordinary sense of the words used, and there is no reason from the context to give any other than the ordinary sense to them, though they are to be construed as the words of the assurers, and most strongly against them if there be any ambiguity in them. There is no ambiguity in them in this respect. A

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doubt possibly may exist whether the word "false" is to be understood in the sense of false in point of fact, or morally false, though I believe most of us think that it is not to be limited to moral falsehood; but there seems to us to be no doubt, that if the statements are false, in whatever sense we understand that word, if they are used in effecting the insurance, this proviso operates. There then appear to us to be only two questions for the jury on this part of the policy:—Were the statements false? Were they made in obtaining or effecting the policy? Whether they are material or not is not a necessary part of the inquiry. It has seemed to two eminent members of the Irish Bench, Mr. Justice Moore and the then Lord Chief Justice Blackburne, that the materiality of the question was involved in the inquiry, whether it was used by the assured to induce the company to effect the policy. We do not agree in that reason. It is true that the materiality of these statements may be sometimes evidence of the purpose with which they were made, and may tend to show that they were made with the object of obtaining the policy, because if immaterial they would not be likely to effect it; but the materiality is not a necessary condition to bring them within the scope of the proviso, if it be shown that the statements were made in obtaining the policy and for the purpose of effecting it; and here the terms of the particulars and the subjoined declaration preclude all doubt upon that question; for the truth of the answers is, in the strongest terms, made essential to the validity of the policy. We therefore answer your lordships' first question in the negative, notwithstanding the ability shown by the judges who have expressed their opinion that the materiality of the answers was a necessary part of the proof.

With respect to the second question proposed by your lordships, we answer, that the exceptions, on the issue joined on the second and third pleas, are not sustained, and that on a formal ground. The bill of exceptions should have stated what directions the judge gave, as it is misdirection, not non-direction, which is the proper subject of a bill of exceptions. This was determined in the case of *M'Alpine v. Mangnall*, in error, (3 C. B. 516.) If it had been stated that the learned judge told the jury it was necessary on those issues to prove the materiality of the answer, the exception would have been well founded. So it would if the ground of his refusal to put the question in that form had been that all the allegations in the plea should have been proved, and that there was no evidence to that effect; because the plea being, in our opinion, good, as the materiality was not essential, the proof of a part, which, if pleaded and proved, would have barred the action, was sufficient. It would have been otherwise if the plea had been bad, when every part must have been proved in order to sustain it, and obtain a verdict upon it.

July 14. — The House now delivered judgment.

THE LORD CHANCELLOR, after stating the case, proceeded as follows:—My lords, the important question is, whether the learned judge was right in having directed the jury, that although the statements of the assured as to none of his relations having died of pul-

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monary complaints, and as to his life never having been previously insured or rejected, were false statements made to the company "in and about effecting the insurance," they must find their verdict for the plaintiff, unless they were satisfied that those were material statements. My lords, although the learned Chief Justice (Blackburne) came to a conclusion different from that at which the learned judges advising your lordships have arrived, in which I concur, and in which I am about to propose to your lordships to concur, yet I think he very distinctly states that which is to be collected from the opinions of the other learned judges, but which is more shortly and tersely stated in the judgment of Blackburne, C. J., than by any other of the learned judges; and it is to that, therefore, that I will call your lordships' attention. The Chief Justice says—"The plaintiff in error contends that it is sufficient to ascertain simply, in the terms of the policy, that the false statement was made in or about obtaining the policy, and that, when this is done, the words of the condition are so comprehensive and stringent that the question is solved, and the policy avoided, whether the statement was material or immaterial; in other words, that we are to read the clause as if it had contained these very words. I admit, if this be the meaning of the words—if this be so clearly expressed as not to admit of any other rational construction, we must give them the operation contended for. But is this so? It is obvious, that, to maintain a defence founded upon this provision of the policy, proof must be made, first, of the false statement of some matter or fact; and, secondly, that it occurred on the occasion of effecting the policy. The judge and jury must inquire into both, and decide both." Up to this point I entirely concur with the learned Chief Justice. He puts the case very distinctly and clearly—"What could answer this inquiry, or be said, in any propriety of language, to come within such terms, but a misstatement, used by the assured to induce the company to contract? and how could it have done so if it were utterly immaterial?" Now, there, my lords, I differ from the learned Chief Justice. The company stipulate this—"You shall contract with us that you warrant certain things to be correct. Further than that, if you make to us any untrue statement in and about effecting the policy, that shall avoid the policy." And then the company say: "We will not contract with you till you answer these two questions as the basis of the contract—'Have any of your relations died of pulmonary complaints? Have you been refused to be insured in any other office?' If you do not answer those two questions accurately, the policy shall be void." That is the interpretation, which appears to me irresistible, when you take the policy and the particulars which were required to be subscribed together. The requirement is extremely reasonable, and the reason of making such a stipulation is obvious, and is explained by this very case. Whether or not certain statements are or are not material, where parties are entering into a contract of life insurance, is a matter upon which there must be a divided opinion. Nothing, therefore, can be more reasonable than that the parties who are entering into that contract should say for themselves whether they think any thing material or not; and if they

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choose to do so, and to stipulate that unless the assured answer a certain question accurately the policy or contract which they are entering into shall be void, it is perfectly open to them to do so. Now, it appears to me, my lords, that that is precisely, what the company have done here. They have said — “The basis of our contract shall be your answering truly these two questions.” There were a great many others; but, putting those aside, they say — “The basis of the contract between us shall be, that you shall answer truly these two questions; and if you do not answer them truly, the policy shall be void.” But then, when the trial comes as to whether the plaintiff has made out his right under that policy, the question is, whether the direction to the jury ought not to have been — “You are to ascertain whether what was then stated was untrue was false.” If it was false, there is no question as to whether it was material or not, the parties having stipulated, that if it be false the policy shall be void. Therefore the question for the jury to decide was simply whether it was false or not. In that narrow compass the whole case lies. The learned judges proceeded upon this well-known law — that there is a great distinction between that which amounts to what is called a warranty, and that which is merely a representation inducing a party to enter into a contract. Thus, if a person effecting a policy of insurance, says, “I warrant such and such a thing, which is here stated, and that is a part of the contract,” then whether they are material or not is quite unimportant. The party must adhere to his warranty, whether material or immaterial; but if the party makes no warranty at all, but simply makes a certain statement, if that statement be made *bonâ fide*, unless it is material, it does not signify whether it is false or not false. Indeed, whether made *bonâ fide* or not, if it is not material, the untruth is quite unimportant. If the man, on entering into the policy, had said that he arrived at Dublin three days previously, whereas he had only arrived that morning, it would be quite immaterial. If there be no fraud in a representation of that sort, it is perfectly clear that it forms no part of the contract. Even if it be material in such a case, if there be no fraud in it, and it forms no part of the contract, it cannot vitiate the right of the party to recover. There are several cases which are collected together in 1 Douglas, in which this principle is well illustrated. But, my lords, it appears to me that that principle has no application to a case where it is part of the contract, as it is here, that if a particular statement be untrue, then the contract shall be at an end. That distinction appears to me to have been overlooked by the learned judges, and that oversight has been the ground of that which I must consider to be the erroneous conclusion at which they arrived. My lords, it is within this narrow compass that the case lies. We have had the assistance of eleven of the learned judges of this country. They all took the same view of this case, and were of opinion that the learned judges in Ireland committed an error in supposing that this doctrine of representation, as distinguished from a warranty, was applicable to the present case, in which the representation is itself embodied in the contract. They thought that the conclusion at which the learned

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judges in Ireland arrived, was erroneous. My lords, in that view of the case I entirely concur. Therefore I shall think it my duty to move your lordships that judgment be given for the plaintiff in error.

LORD BROUGHAM. My lords, I entirely agree with my noble and learned friend, that this case really lies in a very narrow compass. It depends entirely upon the construction which we are to put upon these words in the policy, "or any false statement made to them (the insurers) in or about the obtaining or effecting of this insurance." Now, first, there is the warranty; then there is, previously to the clause in question, "or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed or communicated to the said company, or if any fraud shall have been practised upon the said company;" and then comes this larger, and as it were more sweeping clause, "or any false statement made to them;" as if it were, or any false statement whatever "made to them in or about the obtaining or effecting of this insurance." Now, at first I had some doubt, as the learned judges appear to have had, with respect to the word "false," whether it implies merely untrue, or morally false — untrue, whether within the knowledge of the party making it or not; or morally false, that is, untrue within his knowledge of its being untrue. At first I certainly had an impression on my mind that it was to be taken as implying *morally false*, rather than as untrue merely; and that impression was grounded upon what immediately precedes, for "true" is used in a former part of the document, and then "fraud" is used in the immediately preceding clause. Therefore I had the impression at first that "false" there meant morally false, as contradistinguished from merely untrue. I have since come to the opinion which my noble friend and the learned judges advising the House have come to, that it does not mean morally false, but simply untrue. But be that as it may, it is quite immaterial; for whether we take the word as untrue absolutely, or untrue within the knowledge of the party making the statement, in either case it appears to me, as it has done to the learned judges, perfectly clear, that the two questions to put to the jury were, first, was there an untrue statement made, whether with or without the knowledge of the party making it that it was untrue or not? secondly, was it made in or about the obtaining or effecting this insurance? According to my opinion, agreeing entirely with that of my noble and learned friend and the learned judges, those were the fit and proper questions, and the only questions, to be put by the learned judge to the jury. And I think further, that it would have been a matter of exception, and would have made the direction of the learned judge to the jury liable to exception, if he had directed them, as is contended by the defendant in error, to consider the materiality of the statements in question. I therefore am of opinion with my noble and learned friend, that in this case we ought to give judgment for the plaintiff in error.

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LORD ST. LEONARDS. My Lords, I believe that a more important case than the present has not come before your lordships during this session; because, although the point turns simply upon the proper construction of the instrument, yet it leads to such important consequences with regard to insurances for life, which are so common in this country, and upon which people entirely depend as their security for a provision for their families, that it becomes exceedingly important to consider maturely what is the true construction of an instrument of this sort. It is of course prepared by the company; and if, therefore, there be any ambiguity in it, it must be taken according to law more strongly against the person who prepared it. At the same time your lordships must take care to guard companies of this nature against any fraud, and to give validity to any part of the contract which has that object. That has been the practice for many years past. The courts of law, observing how very often companies of this nature have been subjected to frauds, have advised those companies to protect themselves by a sufficient provision against the commission of fraud; and that has led to such stringent provisions as those which we find in this case — provisions which I am bound to say, unless they are fully explained to the parties, will lead a vast number of persons to suppose that they have made a provision for their families by an insurance of their lives, upon the payment out of their income of perhaps a very considerable portion of it, when, in point of fact, from the very commencement, that policy was not worth the paper upon which it was written; and, as in the present case, the companies take care to go beyond the law; that is, the law has itself thrown a shield of protection around them, and if a statement, which is not a warranty, but a representation, be made contrary to fact, a material statement, that will by law, without any provision to that effect in the contract, avoid the policy. But then, if that statement was not untrue to the knowledge of the party who made the representation (the assured) he is entitled to recover the sums which he has paid. So that, although provision for the family is not obtained, yet there is no actual damage done to the fortune of the man. He is disappointed in his object, but the money which he has accumulated and paid for the insurance, is repaid to the family. This company has taken care that no such consequence shall ensue, and that, if any statement within their contract has not been truly represented, the man's family shall not only lose the benefit of the policy, but shall not be able to recover a single shilling of the premiums paid, however numerous they may have been. Now, my Lords, this is rather a singular case. This company started, in dealing with Mr. Fitzgerald, as all such companies do. They tendered to him certain particulars in writing or printed, which they required him to answer, and to sign a declaration at the end of them. Certain questions were asked, most of them being material, the questions being twenty-seven in number; of those questions, which the man answered, whether truly or not, the company, when they came to frame their policy, chose to select some fourteen, and to make every one of those questions, that is to say, fourteen out of twenty-seven, the express subject of the warranty; and they even carry it so far, as

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that, as regards the material questions, they leave out a particular portion from his answer. Question 12, in particular, stands thus:—“Is the party afflicted with an habitual cough, or any disease of the lungs, or any disease or disorder tending to the shortening of life?” That draws the man’s attention to those particular diseases which are enumerated. In the warranty they make him warrant that he is not afflicted with an habitual cough, and leave out in the warranty the words “or any disease of the lungs,” and then they add the other general words, which no doubt are sufficient, “or any disease or disorder tending to the shortening of life.” But in the warranty they do not call his attention to the importance of the question whether he had any disease of the lungs. I only give that as an example. Now, looking to the questions which they have omitted in their warranty, we find they have omitted those two very important questions upon which this case has ultimately turned. I cannot conceive two more material questions. One is, “Have any of your family died of consumption?” He said, “No.” Another is, “Has your life been refused to be insured by any other company?” He answered in the negative. We are not now dealing with the truth or falsehood of the representations; this House has to deal with the abstract question of the construction of the policy; but I am putting it just to try the case. Supposing those questions to have been untruly answered, you would look naturally to the policy to see whether they were there; but the policy has excluded them. Now, the policy takes this shape; it states as many of the questions as the company has chosen to take out of the particulars, and it states these as so many warranties; it then proceeds upon that warranty to grant the policy, going on in the common form assuring the money. Then comes this proviso, upon which the policy is granted—that in case he should do certain things, or go abroad, or enter the army or the navy, and so on, the policy shall be void. That is all quite right. Then come these important words, making void the policy—“or if any thing so warranted should not be true.” Now, there the attention of the assured is drawn at once to the warranty. He reads the terms of the warranty, and he is told, that if any thing that he states is not true, the policy is to be void. The word “true” there is used, of course, in a general sense, and whether the man knew it to be false or not is utterly immaterial. Whether the circumstances warranted were material or not is entirely out of the question. It is simply sufficient, and ought to be sufficient to avoid the policy, that any one thing warranted is not true; and therefore the word “untrue” there is used in its general sense of an untruth in the abstract. Then comes this, I may say, remarkable clause in reference to this contract. Your lordships will observe, that whenever they begin a new limb of a sentence they begin it with a conjunction. The first is this, which I believe I have already read—“or if any thing so warranted should not be true.” The next is—“or if any circumstance material to the insurance should not have been truly stated, or should have been misrepresented or concealed, or should not have been fully and fairly disclosed and communicated to the said company.” That is all one limb of the sentence, and that

is all governed by the same words, the first words — “or if any material circumstance.” So that all the misrepresentations and all the misstatements which are there guarded against are with reference to some circumstance material to the insurance — “or if any circumstance material to the insurance should not have been” so and so. Now, so far it is perfectly correct, only it would have been much better if they had inserted those other things which they meant to consider material — the questions they had asked, and which had been answered; it would have led to a better understanding of the contract. But still the second limb of this sentence is right enough. The first is, if any portion of that warranty is untrue; the second, if any material circumstance has been untruly stated. If it is material, then its untruth will avoid the contract, although the party did not know it to be untrue. So far, I entirely go along with the contract.

Then come those words upon which so much has turned, and which have led to so much division of opinion; and I must take the liberty of saying, that that very difference of opinion which has existed between such very learned persons upon such an important case as this, of itself shows the improper manner, in my judgment, in which this policy has been framed. A policy ought to be so framed that he who runs can read. It ought to be framed with such deliberate care, that no form of expression by which the party assured can be caught on the one hand, or by which the company can be cheated on the other, shall be found upon the face of it, and nothing should be wanting in it the absence of which may lead to such results. When you consider the persons with whom such contracts as this are entered into, men in lowly and humble conditions of life, who can but ill understand such contracts, they ought not to be framed in a manner which shall so perplex the judgments of the first judges of the land as to lead to a serious difference of opinion between so great a number of learned persons as probably has ever been exhibited before your lordships' house. Now, the words which have led to this great difference of opinion are these — “or if.” There begins the last limb of the sentence: it is all governed by the words “or if” — “or if any fraud shall have been practised upon the company, or any false statement:” all governed by that first “if” — “or if any fraud shall have been practised upon the company, or any false statement made to them in or about the obtaining or effecting of this insurance, this policy shall be void, and the premiums shall be forfeited.” Now, what does this mean? Nothing can be more simple than the meaning of the first words, “or if any fraud.” The provision against untrue statements and other material matters, before made, might be personation, for example. A great many descriptions of fraud may be in action. There might be many circumstances concurring to a fraud that could not be described, because fraud is a very general term; and it is impossible, therefore, to particularize beforehand what is meant by fraud. But you know very well what fraud is when it comes before you for judgment. Therefore, if there should be fraud, this policy very properly strikes at it. Now, the difficulty in which the judges in Ireland involved themselves was this — they were endeavoring to

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import the word "material," which is found in the second branch of the sentence, into this branch. Of course, you could not speak of any thing so absurd as a "material fraud." "If any fraud" stands quite right. If any fraud has been committed, the policy is to be void. Then what is the meaning, in conjunction with those words, of what follows — "or if any false statement be made to them in or about the obtaining or effecting of this insurance, this policy shall be null and void?" Surely, my lords, there, "false statement" must mean something which is connected with that which occurs in the other branch of this limb of the sentence, namely, "fraud." I have provided against any untrue statement generally contained in the warranty. I have provided against any material misstatement generally. Then I come to "fraud;" and fraud may be committed in action without any actual misstatement; and therefore I connect with that, "false statement." Now, when I find that the contract uses two words which may have the same meaning, but which are open to different senses, to express the same thing, I must be very well satisfied, before I apply the same construction to those two words, that such was the intention; for if a proper word is used which admits of a different sense, although it may admit of the same sense, I should come naturally to the conclusion, if there is nothing in the context to prevent it, that the intention was not to use the second word in the same sense in which the first word was used, or else why not repeat the first word? Now, in what sense is the word "true" employed in the first part? "True," there, is used in the general sense; it signifies, not whether it is logically true or not; the question is, whether it be true. If it be not true, the consequences follow under this contract. But when I use the word "false" in a sense connected with fraud, what do I mean? I mean not only that which is untrue, but I mean that which is malicious, wilful — which is criminal, which is false in an odious sense, and to the man's knowledge; and therefore the construction which, after a great deal of consideration, I should put upon this part of the clause, certainly is, that it refers to a wilful fraud — a wilful misstatement; and that the word "false" there is used in contradistinction to the word "untrue" in the former part of the sentence, and means a wilful misstatement; and then connecting that with the subsequent words, a wilful misstatement, as it should be read, "in or about the effecting of the insurance," I think all the mischief will be taken out of this policy; because I think there is no jury who, having such a case before them, would, where a mere impertinent question had been asked of a man, and untruly answered, though it might be held to be about the insurance, come to the conclusion that that man had committed wilful falsehood upon such a subject, when the statement had not and could not have any material bearing upon the insurance; and if the untruth must be wilful, I think that any honest man would be safe, even under this contract, in such a construction. The question, then, would be, was this a wilful falsehood in or about effecting the insurance? Supposing it were some indifferent question which they chose to put to him, and which he had answered, but yet had not answered truly; if the jury were

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satisfied that it was a mere impertinent, irrelevant question, their verdict would be in his favor. For observe, if it be an impertinent or irrelevant question, how likely it is that the assured will have his prudence and his caution lulled asleep, and will not be so alive to the duty of answering truly as he would be, meaning to act honestly, in regard to matters which he could not help feeling were essentially necessary to be answered in order to enable the company to form their judgment upon the subject. I think that your lordships, and every court of justice, should endeavor to give such a construction to a policy of this nature as will afford a fair security to the person with whom the policy is made, that, upon the ordinary construction of language, he is safe in the policy which he has accepted. I am quite sure that if policies of this nature are to be entered into, and such doubts are to be raised as have been raised in this case, that very important branch of insurance, life insurance, will become very distasteful to people, and that no prudent man will effect a policy of insurance with any company without having an attorney at his elbow to tell him what the true construction of the document is. And, indeed, in this case it has been necessary to consult all the judges in Ireland; and they, having decided in one way upon the language of this policy, all the judges of England have come to a different opinion. My lords, notwithstanding that I have thought it my duty, and of great importance, to draw your lordships' attention to the true construction of this policy, I do not disagree with my noble and learned friend in the motion which he has made, because I think the jury were not properly directed as to the materiality of the untrue statements. I think that in reference to these two questions—for example, whether any of his relations had died of pulmonary complaints, and whether his life had been refused by any other company—the learned judge ought not to have told the jury that they ought to find for the plaintiff in error, unless they were of opinion that those statements were both false and material. I think that that was a wrong direction, and therefore I agree with the motion of my noble and learned friend. But I think it very important to impress upon companies that they ought not to issue policies in this shape, and I think that this company would do well if they were to place the word “wilful” before the words “false statement” in that latter branch of the clause. So, if it is their intention to exclude materiality, I think it would be but honest and fair to state so upon the face of their policy, so that persons who are really not competent to form a judgment upon such a question may at once upon the face of the policy see what risks they run; for remember that the proviso inflicts the loss upon the family not only of the sum assured, but of all the sums, which may have been a great portion of the saving of a man's life, which have been paid for the policy itself. After all, everybody feels this difficulty. The company are entitled, and they are bound, to guard themselves against fraud; and courts have always shown the utmost anxiety to protect them against fraud, and always will do so. We are not entitled to look at the facts of this case, and therefore I am not using the facts for the purposes of the judgment which

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I am recommending your lordships to give; but the facts of this case were very likely to mislead any man in his judgment, because, in point of fact, the jury went wrong in this case, and the proper application to the court would have been to set aside the verdict, and not to have taken the exception to the judge's charge. Nothing upon earth could have been clearer than that the two questions were material. The jury were perverse, and went wrong in bringing in a verdict contrary to the evidence as to the materiality of the questions. What could have been more material than that question, "Has your life been refused by other offices?" — because, if it had been answered truly, they would then have asked him what offices. He must have stated what offices, and then they would have had an opportunity of inquiring of those offices what were the grounds upon which they had refused him. Nothing, therefore, could have been more material. It seems to have been, so far as we can judge from the evidence, a very proper case for the company to resist. Therefore I am not finding fault with the conduct of the company in this case, but I am drawing your lordships' attention, which I thought it very material to do, to the terms of the policy. I think the company are right enough in the course they took in resisting the claim, but I think they are not right in the frame of their policy. I entirely agree with the motion of my noble and learned friend.

Judgments of the Courts of Exchequer and Exchequer Chamber in Ireland reversed, and a venire facias de novo granted.

GIBSON, plaintiff in error, v. SMALL and others, defendants in error.¹

December 1852, and April 28 and June 3, 1853.

Insurance — Time Policy on Ship — Implied Warranty.

Time policy in the usual form on the good ship "The Susan," lost or not lost, in port and at sea, in all trades and services whatsoever and wheresoever, during the space of twelve calendar months, commencing on the 25th September, 1843, and ending on the 24th September, 1844. To an action on the policy, the underwriter pleaded that the ship was not, at the time of the commencement of the risk in the policy mentioned, nor at the making of the said insurance, nor on the 25th September, 1843, seaworthy: —

Held, affirming the decision of the Exchequer Chamber, (15 Jur. 325, s. c. 3 Eng. Rep. 299,) which reversed the decision of the Court of Queen's Bench, (14 Jur. 368,) that the plea was bad in law.

¹ 17 Jur. 1131. Error from the Exchequer Chamber. Before the Lord Chancellor, (Lord St. LEONARDS,) Lord CAMPBELL, and other lords, with the assistance of the learned Judges, POLLOCK, C. B.; PARKE, ALDERSON, PLATT, and MARTIN, BB.; MAULE, ERLE, WILLIAMS, and TALFOURD, JJ. The case was argued during Lord St. Leonards' Chancellorship, but judgment was pronounced *tempore* Lord Cranworth.

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In a voyage policy, the law implies a condition of seaworthiness, but no such condition is implied in regard to time policies.

Seable, "If, however, a ship be about to sail on a particular voyage, and a time policy be effected instead of a voyage policy, I think, as at present advised, that the condition of seaworthiness at the commencement of the voyage, would be implied." — Per Lord St. Leonards.

Sed contra — "As at present advised, I should decide against the implied condition in all cases of time policies, and should be glad if it were understood, that in all voyage policies there is, and in no time policies framed in the usual terms is there, a condition of seaworthiness implied." — Per Lord Campbell.

THIS was a writ of error upon a judgment of the Exchequer Chamber, (reported 15 Jur. 325, s. c. 3 Eng. Rep. 299,) reversing a judgment of the Court of Queen's Bench, (reported 14 Jur. 368,) which was given for the defendant in an action on a policy of assurance on the good ship or vessel called *The Susan*, lost or not lost, in port and at sea, in all trades and services whatsoever and wheresoever, during the space of twelve calendar months, commencing on the 25th September, 1843, and ending on the 24th September, 1844, both days included. The first count of the declaration was founded on this policy, and averred a loss by perils of the seas during the risk in the policy mentioned. To that count the plaintiff in error pleaded four pleas, the second and material one of which was as follows:—"That the said ship or vessel in the said declaration mentioned was not at the time of the commencement of the said risk in the said policy of insurance mentioned, nor at the making of the said insurance, nor on the said 25th September, 1843, in the said declaration mentioned, seaworthy, or in a fit and proper condition safely to go to sea, but, on the contrary, she was wholly unseaworthy." At the trial of the cause at the sittings in London after Trinity term, 1848, the jury returned a verdict for the defendant below on the second plea, and for the plaintiffs below on the other pleas. A rule was then obtained in the Court of Queen's Bench for judgment for the plaintiffs, notwithstanding the verdict for the defendant below on the second plea; but that rule was discharged, the Court of Queen's Bench being of opinion that the plea was good. (14 Jur. 368.) A writ of error was brought from that Court to the Exchequer Chamber, which latter court was of opinion that the said plea was in substance bad, and that the plaintiffs below, (the defendants in error,) were entitled to judgment *non obstante veredicto* and reversed the judgment of the Court of Queen's Bench. From that decision the present writ of error was brought, and it was submitted on the "case" of the plaintiff in error, that the judgment of the Exchequer Chamber was erroneous, for the following amongst other reasons:—First, because a warranty that the ship is seaworthy at the commencement of the risk has always been implied in marine policies; secondly, because the absence of knowledge in the owner as to the state of his ship at the commencement of the risk is no ground for refusing to imply a warranty of seaworthiness in time policies more than in other policies; thirdly, because the underwriter has no means of apportioning his premium to the risk in the case of a ship of the condition of which he is ignorant, except upon the assumption that she is seaworthy; fourthly, because

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the warranty, if implied, only works out the justice of the case between the parties by returning the premium to the assured, and discharging the underwriter, where the ship turns out not to have been in an insurable condition at the time when the risk commenced, and the two parties, in ignorance of the condition, conditionally contracted for her insurance. The "reasons" assigned by the defendants in error in support of the decision of the Court of Exchequer Chamber were as follow: — "That in the case of voyage policies, a warranty of seaworthiness at the commencement of the risk is reasonably capable of being observed by the assured; but that in the case of time policies, as the risk must frequently commence in the middle of a voyage, during which the ship may have become unseaworthy, the assured can neither know nor remedy the unseaworthiness: that the implication of a warranty of seaworthiness at the commencement of the risk is therefore unreasonable as applied to time policies: that there is no established rule of law, nor any known custom of insurance, by which such warranty can be ingrafted on or implied in a time policy: that if the analogy of voyage policies is to be adopted, the warranty to be implied is not a warranty of seaworthiness at the commencement of the risk, but a warranty of seaworthiness at the commencement of the voyage on which the ship is engaged when the risk commences."

The Attorney-General (F. Thesiger) and J. Wilde, for the plaintiff in error.

The Solicitor-General (F. Kelly) and Shee, Sergt., (with whom was *Unthank*,) for the defendants in error.

The arguments and authorities are all so fully noticed in the "opinions" of the learned judges, and in the judgment of the lords, that it is not considered necessary to insert them, particularly as they were nearly the same as those used on the two previous arguments of this case, 14 Jur. 368, and 15 Jur. 325; s. c. 3 Eng. Rep. 299.

At the close of the arguments, the following questions were put by the house to the learned judges: —

First, adverting to the record and proceedings in this case, is the policy subject to an implied condition or warranty that the ship was seaworthy?

Secondly, if yea, then did the condition of seaworthiness mean that the ship was seaworthy at the time she commenced her voyage, or at the making of the insurance, or when the liability of the underwriters commenced — that is, on the 25th September, 1843?

Thirdly, are there any, and if any what, qualifications in regard to such seaworthiness, in a case like this, which would affect the rights of either party under the policy?

Fourthly and lastly, whether the plea is a valid plea in law in answer to the action?

POLLOCK, C. B., on behalf of the judges, requested time to consider their reasons, which was granted, and the further consideration of the case was adjourned.

April 28. The judges now attended, and delivered their opinions as follows : —

MARTIN, B. In answer to the first, second, and third questions proposed by your lordships to the judges, I have to state, that, advertg to the record and proceedings in this case, I am of opinion that the policy in question is not subject to any implied condition or warranty that the ship was seaworthy. It is an established rule of law, that a written contract, (subject to certain known exceptions,) shall be taken to contain and express the entire contract between the parties. The rule is well illustrated in 1 Stark. Ev. 648, last ed. ; and there is no doubt, that, subject to the exceptions to which I have referred, a written instrument, whether it be appointed by law or by the compact of the parties to be the memorial of the contract, shall not be altered or varied or added to. In the present case the contract between the parties is a policy of insurance, dated the 27th November, 1843, “on the good ship Susan, lost or not lost, from the 25th September, 1843, to the 24th September, 1844, both days included ;” and the alleged condition or warranty to which your lordships’ questions refer is, that the ship was at some period, either at the commencement of her original voyage, or on the 25th September, 1843, (when the risk was to attach,) or on the 27th November, 1843, (when the policy was made,) in a particular state or condition expressed by the term “seaworthy” — a term which has a known meaning, as well in regard to a ship in port as to a ship upon the commencement of a voyage, and about to be exposed to the perils and dangers of the seas.

The terms of your lordships’ questions import that no such condition or warranty is expressed in the policy itself ; and there are not any words in it, except the words “good ship,” from which such a warranty could possibly be implied. I am aware it has been said that these words authorize such an implication ; but the learned counsel for the plaintiff in error did not so contend ; and I think it clear that the word “good,” as there used, is merely a description of the ship, and not a warrant of seaworthiness, which includes a proper supply of stores, the fitness and sufficiency of the master and crew, and several other matters, to which the words “good ship” have no reference whatever ; and I think it may be stated with certainty, that if such a warranty arises by implication, it must be by an implication of law, or one of that character, and not from any words in the policy. This was the argument on behalf of the plaintiff in error at your lordships’ bar, and it was contended that the seaworthiness of the ship was, by legal implication, a condition precedent to the contract attaching, and that it must be taken as agreed between the parties that the subject-matter of the insurance was a seaworthy ship. There can be no doubt that such a case might fall within the exception as to written contracts before referred to, and that it might be alleged and proved, as an addition to the written contract, that such a warranty was understood and known to exist by all persons engaged in the business of underwriting. There is no such allegation or proof in the present

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case, which arises upon the question of a judgment *non obstante veredicto*, (a proceeding substantially the same as a demurrer,) on a plea in which no warranty is averred. I think, however, that if such an understanding or custom had been long notoriously prevalent, and had been adopted and acted upon in courts of law, your lordships would take judicial notice of it, without requiring any averment or proof in the particular case, and act upon and apply it in precisely the same manner as a rule of law. This principle was laid down by the Court of Exchequer Chamber in *Brandas v. Barnett*, 6 Man. & G. 630; and although this judgment was reversed in this house, the above principle was approved of.

The question, therefore, really is, "Has the existence of such a condition of warranty been notoriously prevalent amongst persons engaged in the business of marine insurance?" and for the present purpose it must be shown that the courts of law have adopted and acted upon the principle of it. It was not alleged, on behalf of the plaintiff in error, that such a warranty had ever been held to be applicable to a time policy. On the contrary, it was stated that the present was the first instance in which its application to such a policy had directly arisen. But it was argued that the case of a time policy was in this respect precisely analogous to that of a voyage policy, and that, as the warranty undoubtedly does exist in regard to policies of the latter description, it ought to be held to exist in regard to policies of the former.

A great number of cases and authorities were cited to show that the warranty of seaworthiness existed in voyage policies. There is no doubt of the fact, and that for upwards of a century it has been adopted and acted upon by all the courts at Westminster Hall, and it seems most just and reasonable that it should be so. In voyage policies the owner knows, or has the means of knowing, the condition of his ship, the sufficiency of his stores, and the competency and fitness of the master and crew. It is his bounden legal duty towards the mariners for the safety of their lives, and towards the merchants who load their goods, "that the ship should be stout, stanch, and strong, and in every way fitted for the voyage," or, in other words, "seaworthy;" and it may most properly be implied, that, in his contract with the underwriter, the owner shall be taken to warrant, as the foundation of the contract, that the ship, the subject-matter of the insurance, is or shall be at the time of sailing a seaworthy ship, and that the premium is to be calculated on the principle, that the perils insured against are to be borne by a vessel prepared to resist, and if possible to overcome them; and if the record in this case had shown that the policy had been effected upon the ship upon her setting out from her original port of sailing on the voyage or enterprise on which the loss occurred, I am of opinion, in analogy to the case of a voyage policy, that the warranty ought to be implied. But the record does not show that the policy was effected under any such circumstances; and it is equally consistent with the facts therein stated, that the ship was a whaling ship, sent to the southern ocean, and intended to be absent for several years, or was a ship sent, (as is now extremely com-

mon,) to a distant quarter of the world, and intended to trade there for an unlimited time — indeed, not to return to England unless forced by necessity so to do for repair — and that the policy was effected to protect the ship after a former one had expired. Now, is there any analogy between this case and a voyage policy? In my opinion there is not. In the first place, can it be reasonably supposed that either party thought of taking into consideration the condition of the ship at the time when she commenced her voyage or enterprise? Upon the present supposition she had been for a period of time at sea, and was in existence as a ship at the time of the commencement of the risk; otherwise the policy would not attach at all, and the premium would be recoverable back. It seems to me impossible to conclude with reason, that, under such circumstances, either party contemplated the condition of the ship at the time of her original sailing, and that it would be improper to imply any warranty in regard to that time.

Secondly, is the warranty to be implied as the time of the making the policy? In considering this point, I think it proper to state, that, in my opinion, fraud or misrepresentation or concealment has nothing whatever to do with the question submitted by your lordships. If the assured committed any of these things, the policy is void upon an entirely different principle. An assured is bound to communicate to the underwriter every material circumstance within his knowledge, and, unlike other contracts, honesty will not in this peculiar one protect him. Both parties must, therefore, in my opinion, for the purpose of this present question, be assumed to be in the same state of knowledge or ignorance as to the circumstances or condition of the ship, and I am at a loss to perceive what ground or analogy there is for supposing that the assured takes upon himself the hazard of his ship being seaworthy at the time when he makes the contract of insurance. His very object in effecting the policy is to pay a sum of money or premium for the purpose of casting upon another the perils and chances of the voyage during the period insured. Indeed, such a warranty does not exist in the case of a voyage policy, and it would seem very unreasonable and inconsistent that an underwriter, who, by the express terms of his contract, is responsible in the event of the ship being totally lost between the 25th September, 1843, (when the policy attached,) and the 27th November, (when it was made,) should not be responsible in the event of the ship having received partial damage during the same period, and being unseaworthy at the termination of it.

The third case is, does the warranty exist as regards the time when the risk was to attach? In my opinion it does not. There is no such term in the policy. There is no usage or custom in respect of it, and in my opinion there is no analogy between this case and that of a voyage policy; and I think it would be unreasonable to imply it, as it seems to me to transpose the relation of the assured and underwriter, and to render the former an assurer to the latter, instead of the latter to the former. It was much urged by the learned counsel for the plaintiff in error, that the insurer of goods was by

law subject to the warranty of seaworthiness, and that he was equally ignorant of, and had as little control over, the condition of the ship, as the owner who effected a time policy during a voyage. This is quite true, but I think capable of a very simple explanation. At the time when the warranty of seaworthiness was established, the insurer of goods, (who was not the owner of the ship,) almost universally loaded his goods on board a general ship. The shipowner in such a case was subject to a contract, implied by law, that the ship was "tight, stanch, and strong, and in every way fitted for the voyage," or, in other words, "seaworthy;" and in the event of damage occurring by reason of this contract not being complied with, the owner was responsible. The owner of goods proposing to insure would, in order to render the premium as low as possible, naturally represent that the goods were loaded on such a ship; and his situation, when insured, would be, that he was protected, so far as regarded damage arising from unseaworthiness, by the contract of the owner, and as to damage arising from perils of the sea operating upon a seaworthy ship, by the contract of the underwriter, and this at the lowest possible cost.

It was also urged that the denial of the existence of the condition or warranty in question would open a wide door to fraud; and the instance was put of an owner effecting a time policy who had heard that his ship had sustained damage, and concealing his information from the underwriter. In such a case there would be a clear defence to an action on the policy on the ground of concealment. But it was said that this defence was difficult to be proved. I certainly do not feel inclined to yield to an argument, that because one defence is difficult of proof, the courts of law should therefore admit another, the proof of which is alleged to be more easy. But, in reality, there is no weight in the point; for if the fraudulent owner insured his ship as from a day before the misfortune occurred, this defence of non-seaworthiness would fail, unless indeed the warranty is to be taken to exist as at the time of effecting the policy; for which position there is no authority or analogy whatever.

It was further very much urged that a decision against the plaintiff in error would be very unjust and hard upon underwriters. I do not myself at all concur in this view; but it is satisfactory to know, that by the simple insertion in the policy of the words "warranted seaworthy," at any particular time, both parties will clearly know the nature of their contract upon this point. The result of the investigation has satisfied me that there is no distinction between the warranty of seaworthiness in regard to voyage policies and time policies. Under the same circumstances the warranty is, in my opinion, identically the same. If a time policy be effected upon a ship about to sail from a given port on a voyage or enterprise, the ship must, in my opinion, be seaworthy at the time of sailing; otherwise the policy does not render the underwriter liable. But in the event of the time policy being effected upon a ship after she has begun her voyage, and to commence during the progress of it, such a case is, I think, entirely out of the operation of the rules of law in respect of the

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“warranty of seaworthiness,” and is not affected by them; and if the ship exist as a ship at the time of the commencement of the risk, the underwriter is responsible, whether she be then seaworthy or not. Misrepresentation or concealment in respect of the ship’s seaworthiness would render the policy void; but in the case of mutual and common ignorance the underwriter is, in my judgment, that which the spirit of the contract requires him to be, the insurer, and the party who is to bear the hazard. For these reasons, I have to state, in answer to your lordships’ first, second, and third questions, that in my judgment the policy referred to is not subject to any implied condition or warranty of seaworthiness; and to the fourth, that the plea is not a valid plea in law in answer to the action.

TALFOURD, J. In answer to the first question proposed by your lordships, I have to submit my reply, that the policy to which it refers is not subject to an implied condition or warranty that the ship insured was seaworthy. The grounds on which I have arrived at this conclusion are simple, and may be stated in few words. The question applies to an instrument in writing, which must be assumed to express all the terms which the parties desire to embody in their contract, unless there shall be found to exist some condition or warranty so clearly established by mercantile usage as to have become part of mercantile law, and to be understood when the contract is silent. The obligation of establishing that such a usage has produced such an implication lies on the party asserting it; and the question is, whether, in this case, the defendant below has succeeded in establishing that an implication of seaworthiness exists in the case of a time policy. Now, it is conceded on the one hand, that in the case of a voyage policy such an implication exists; it is conceded on the other hand, that if established in the case of a time policy, it must be by the application of the principle thus recognized to time policies, as being in their nature subject substantially to the same considerations and requiring the same rules as policies on voyages.

In the able arguments which have been addressed to your lordships on this subject it has been admitted, that although some dicta of judges and some expositions of jurists may be cited in favor of the theory of those who maintain the application of the implied condition of seaworthiness to time policies, no decision of an English court has ever been pronounced affirming it. Unless, therefore, its supporters can establish an analogy so nearly perfect between the two cases as shall render the rule of mercantile law, which is confessedly applicable to the one class of policies, applicable also to the other, they must fail in the attempt to ingraft on a written contract a condition or a warranty which it does not express. If it were clear that the implied condition, in case of voyage policies, of seaworthiness for the voyage at the commencement of the voyage, is founded on a principle that the subject-matter of every marine insurance must, in order to the contract attaching, be fit for the endurance of the contemplated perils, it might follow that such a condition would equally apply where the contract is one of insurance from one point of time to another point

of time, irrespective of the employment of the vessel. But it will be found, on examination of all the text-writers, that the doctrine is generally based on the more limited consideration of the power of the owner to render his vessel seaworthy at the commencement of the adventure insured, and on the means of knowledge fairly attributable to him at the time of the contract; and that hence, from the circumstances existing in a great majority of cases, a general rule has been deduced applicable to all. It is true that the rule, thus based, being once established, is not, in its application, confined to such cases as those which led to its adoption; but that, once adopted, it is applicable to the entire class, whether the instance may be similar to the mass of cases which created the rule, or to mere exceptions which must always have existed. It is, therefore, a fallacy to contend that a recognition of this knowledge or power of the owner as the basis of the rule prevents its application to cases where the ordinary incidents may not occur, and thus render it wavering or uncertain.

It is one question whether, in the case of a voyage policy, the owner may insist on the circumstances of his particular case as an exemption from the condition of seaworthiness by reason of his want of knowledge or means of knowledge of the state of his ship at the time of the commencement of his risk; and another whether the condition shall be implied in a different class of insurances to which it has never been judicially applied, and in which the rule and the exception change places. There are no doubt cases of voyage policies in which the owner may be destitute of the means of ascertaining the state of his vessel, and cases of time policies in which he may possess such means; but the rule is founded on considerations of convenience applicable to the mass of instances in the one case which do not exist in the other; it must be applied to the class which created the rule, and must not be varied to suit the exception. The very interpretation of the term "seaworthiness" in voyage policies suggests a material distinction between the two classes; for it is not a word of absolute, but relative meaning, for it is modified according to the nature of the voyage contemplated by the policy. How can the term be applied in this its flexible sense to policies for time — policies irrespective of a voyage contemplated, begun, or to be renewed, which in its terms may embrace a portion only of one voyage, or portions of two voyages, or may include several voyages?

For these reasons, in the absence of any binding authority, I answer your lordships' first question in the negative; and so answering it, I involve the determination of the second and third questions, which assume that, in some sense, a condition of seaworthiness is implied in a time policy. If such condition exists, it would seem to be very difficult to qualify it, or vary its application; and the obvious difficulty of the task would seem to prove that the condition is equally applicable in all cases of the class, or does not exist in any. The importance, indeed, of the determination of the main question to future maritime adventure is not so much whether the implication shall be sustained or defeated, as that the rule adopted shall be general and certain. Let it be decided that there is, in the case of

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any time policy, an implied condition that the vessel shall be seaworthy at some time, though it is very difficult ever intelligibly to state at what time; and the parties may, at their discretion, exclude it, or qualify it by express words. Let it be decided that no such condition is implied, and they may introduce it, either by way of condition or warranty, in reference to such time or occasion as they select, and guarded or qualified according to their wishes. But the most inconvenient result would be, that the law should make a condition for them, and yet leave it open to the evils attendant on an elastic, and therefore an uncertain, rule. It follows from the answer I have submitted to the first question, that the plea, being applied to a condition which is not expressed in the contract declared on, nor implied by law, is not a valid answer to the action; and therefore my answer to the fourth question is in the negative.

WILLIAMS, J. In answering the four questions which your lordships have proposed for the opinion of the judges, I shall take leave to begin with the fourth, because by so doing I shall be able more conveniently and more briefly to explain the principle which I think ought to govern the answers to them all. On the fourth question, then, I am of opinion that the plea is a valid plea in law in answer to the action. Its effect, as I understand it, is to set up as a defence the fact that the ship was not seaworthy at the time of the commencement of the risk of the underwriters, or, in other words, at the commencement of the portion of time for which the insurance was effected. The record does not disclose under what circumstances, whether in port or on a voyage, the ship lay at that point of time; and therefore, unless there is an implied condition, in policies of this nature, that the ship shall, under all circumstances whatever, be seaworthy at the commencement of the risk of the underwriters, the plea cannot be supported. But I am of opinion that there is such an implied condition. I have not been led to this conclusion on the supposition that there is any decision or authority applicable expressly to this point, but because it appears to me that the question is, in truth, governed by a general rule of our law, that in every policy of marine assurance there is an implied condition that the ship shall be seaworthy at the commencement of the risk of the underwriters.

The contention on the part of the assured has been, that this rule is based on the supposition, that in ordinary cases of a voyage policy it is competent to the shipowner or his agents to put the ship into a seaworthy state at the period of the commencement of the risk; and that the rule ought not, therefore, to extend to time policies, inasmuch as it cannot in such cases be presumed generally that the assured knows the condition of the ship at the commencement of the term, or has the power to secure her being seaworthy then. But in my opinion the rule is founded simply on the doctrine, that the object and intention of a policy of marine assurance is, that the owner of a ship which is seaworthy shall be indemnified against certain perils; and if this be the foundation of the rule, I can discover no reason why it should not be applied to a policy for a specified time as well

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as to a policy for a specified voyage. It may be, that, in the application of the rule, the degree of requisite seaworthiness may vary in the case of a time policy from that in a voyage policy. But that question does not arise on this record; for it must be presumed, after verdict, that at the trial the judge properly directed the jury, and that under that direction the jury properly found that the due degree of seaworthiness did not exist at the commencement of the risk. This being my opinion with respect to the fourth of your lordships' questions, it is but matter of form that I should answer the first and second of them by saying, that I am of opinion that the policy is subject to an implied condition of seaworthiness, such condition meaning that the ship was seaworthy when the liability of the underwriters commenced; and that as to the third, (adverting to the record and proceedings,) I am not aware of any qualifications in regard to such seaworthiness, in a case like this, which would affect the rights of either party to the policy.

PLATT, B. This was an action for a total loss upon a policy on the ship Susan, lost or not lost, in port or at sea, and in all trades and services whatever or wherever, for twelve calendar months, commencing on the 25th September, 1843, and ending on the 24th September, 1844, both inclusive. The first count of the declaration set out the policy, and averred a loss during the term of insurance. The defendant, by his second plea, pleaded that the ship was not at the time of the commencement of the risk, nor at the making of the insurance, nor on the 25th September, 1843, seaworthy, or in a fit and proper condition to go to sea; but, on the contrary, wholly unseaworthy. Whether this is a good plea is the question raised by the present writ of error. "Seaworthiness" is a relative term, and when applied to a voyage policy has a subject to which it may distinctly refer. Every vessel at the commencement of each particular voyage requires appliances commensurate and appropriate to the ordinary risks of navigation during the particular voyage contemplated. Its state as to repairs, equipment, and crew, and in all other respects, should, at the time of its sailing on the voyage insured, be fit to encounter the ordinary perils of that particular voyage; and there is no difficulty in fixing the commencement of the risk as the time at which the implied condition or warranty of seaworthiness is to attach. Such, however, is not the case with a time policy. In that case, what degree of seaworthiness should exist at the commencement of the risk? To what use of the vessel should it relate? The vessel may be within a few days of concluding her homeward voyage from Holland, and may be about to proceed on a voyage to Honduras. The Honduras voyage may not have been determined upon at the time of effecting the policy. What in such a case is to be the measure or test of the seaworthiness to be required to exist at the commencement of the risk? It is a mistake to suppose that before the decision of the Court of Queen's Bench in this case any of the courts of Westminster Hall had determined, that in effecting a time policy, the assured warranted the ship to have been seaworthy at the commence-

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ment of the risk. In *Hollingsworth v. Brodrick*, 7 Ad. & El. 40, the Court of Queen's Bench had not so determined; nor had the Court of Exchequer or the Court of Exchequer Chamber in *Sadler v. Dixon*, 5 M. & W. 435, 8 M. & W. 895, so determined. In *Hollingsworth v. Brodrick*, Patteson, J., is reported to have said, "It is clear that the implied warranty is satisfied if the ship is seaworthy at the commencement of the risk. I do not know of any distinction on account of the risk being for time." He, however, thus concludes his judgment:—"But I wish to go upon the ground, that no warranty of seaworthiness is to be implied except at the commencement of the voyage."

In *Dixon v. Sadler*, my brother Parke, in delivering the judgment of the Court of Exchequer, distinctly says that there were not any cases in which the obligation of the assured in the case of a time policy, as to the seaworthiness or navigation of the vessel, was settled; but that it might be safely laid down that it was not more extensive than an ordinary policy. To hold that the assured in a time policy warrants the vessel to be seaworthy at the commencement of the risk would operate most inconveniently and mischievously on commercial enterprise, and deprive the shipowner and merchant of the possibility of completely protecting themselves by insurance from loss by perils of the sea.

My brother Parke, in delivering the judgment in this case in the Court of Exchequer Chamber, thus pointed out some of the inconveniences:—"In the case of a time policy the assured does not necessarily know the condition of the ship at the commencement of the term; she may be at sea in a good or a bad condition; and, if at sea, no care or expense on the part of the assured or his agent could secure her to be seaworthy there. The sudden loss of a yard or sail or rudder might have taken place without the possibility of the assured having been able to replace it; she may have met with such damage that it would have been impossible to repair; she might have lost two or three of her crew by a malignant fever—circumstances which render the case essentially different from the case of insurance on a voyage, when it is always competent for the assured or his agent to put the vessel into a seaworthy state when the policy attaches. With regard, therefore, to the question first proposed by your lordships, seeing how utterly contravention of the very object of marine insurance the doctrine contended for by the defendant is, I think that, unless the implied condition or warranty be of the description suggested at the close of the judgment of the Court of Exchequer Chamber, the policy in the pleadings mentioned was not subject to any implied condition or warranty that the ship was seaworthy. If it was subject to any such condition or warranty, my answer to the question proposed by your lordships is, that it was to a condition or warranty of seaworthiness at the inception of any voyage concluded or begun during the term, and in which during the term the loss assured against might happen. Such a condition or warranty is intelligible; its observance is practical, and would be calculated to extend to the assured and to the underwriter respectively every reasonable protection. My answer

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to the question thirdly proposed by your lordships is, that I am not aware of any qualification in regard to such seaworthiness, in a case like this, which would affect the rights of either party. As, for the reasons I have assigned, I think the implied condition or warranty, if any, cannot attach at the commencement of the risk; and as by the terms of the contract, if the vessel had been lost at the time of making the insurance, that loss would not have vacated the policy; I answer to the question lastly proposed by your lordships, that in my judgment the plea is not a valid plea in law in answer to the action.

ERLE, J. My answer to the first question of your lordships is in the affirmative, that the policy was subject to a condition that the ship was seaworthy. It appears to me that this condition is involved in all contracts of marine insurance, it being necessarily the basis of the calculation on which the insurer relies in fixing the amount of the premium he is to receive. That amount depends on the degree of risk; in other words, on the chance of the ship encountering the perils insured against with safety; and unless it is given that the ship is in some degree fit to meet those perils the loss is certain. As the word "ship" in common use may denote either a mere frame, or a ship with its apparatus ready for sea, so, in marine policies, it may be construed to express either the mere structure of timber, or all that must be combined therewith to make it fit to perform service as a ship; and its meaning in different policies may be made to vary, according to the different nature of the services required of the ships insured thereby; and the contract so construed contains the condition that the ship insured has the degree of fitness for the service it is engaged in which is expressed by seaworthiness; it being now settled that the term "seaworthy," when used in reference to marine insurance, does not describe absolutely any of the states which a ship may pass through from the repairs of the hull in a dock till it has reached the end of its voyage, but expresses a relation between the state of the ship and the perils it has to meet in the situation it is in; so that a ship, before setting out on a voyage, is seaworthy, if it is fit in the degree which a prudent owner uninsured would require to meet the perils of the service it is then engaged in, and would continue so during the voyage, unless it met with extraordinary damage. I have not found a definition of the word, but I gather its meaning, as above explained, from the decisions turning upon it. According to this view, the condition is derived from the construction of the words of the instrument; but whether it is said to be derived from this source, or from implication of law, founded on the nature of the contract, I am of opinion that time policies are subject to it as well as voyage policies.

If the question turns on the construction of the instrument, time policies may be taken to be identical with voyage policies in all the terms, except those relating to the measure of the duration of the insurance. This, in voyage policies, is measured by the motion of the ship; in time policies, by the motion of the earth. Each contract is

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for an indemnity, and each for a limited time; and there seems no reason for holding that an alteration in the terms relating to the time should alter the effect of terms relating to the indemnity. The case may be supposed of a ship about to sail from London to China, and one part owner may insure by a voyage policy and another by a time policy, both policies being in all other respects the same; and the ship may arrive at the end of the time insured, in which case the time covered by both would be the same. But if the ship should be lost within that time, and should have been unseaworthy at the commencement of its voyage, it seems unreasonable so to construe the two contracts that the same words under the same circumstances should produce opposite results, and throw the loss on the insurer in the time policy and on the owner in the voyage policy. And yet this seeming absurdity would be the law if voyage policies are subject to the condition in question, and time policies are not. Also, if a time policy is construed to be without any condition of seaworthiness, the liability of the insurer may be increased beyond the terms of his contract; for, in the case of a ship insured from the 25th September, if on the 24th it was so damaged by a storm that it sunk on the 26th from a peril which would have been harmless but for the prior damage, here the loss originates from a peril not included in the insurance; but if the insurance applies to an unseaworthy ship, the insurer is made liable beyond his contract.

If the question turns on an implication of law arising from the nature of the contract, all the reasons for making the implication in voyage policies are of equal force for making it in time policies. It is equally essential as the basis of the calculation on which the insurer fixes the amount of premium, and equally essential to prevent fraudulent owners from insuring a ship for the purpose of its being lost. All authorities support this view. The only judicial determinations on the question are those now appealed from. The Court of Queen's Bench were unanimous for the affirmative answer to the present question; and the Court of Exchequer Chamber, in overruling that judgment, expresses its opinion to the same effect, in the following passage:—"We are far from saying that there is no warranty of seaworthiness at all in a time policy. So to hold would be to let in the mischief which the law provides against in a voyage policy; or that there is not the same warranty in the case of a time policy as in a voyage policy, according to the situation in which the ship may be at the time of the insurance." The other authorities are declarations indicating an opinion that time policies are subject to a condition of seaworthiness; and I refer to what was said by Gibbs C. J., in *Hicks v. Thornton*, Holt, 30; Tindal, C. J., in *Sadler v. Dixon*, 8 M. & W. 895; and Patteson, J., in *Hollingsworth v. Brodrik*, 7 Ad. & El. 40; and to the passages in 1 Arn. Ins. 670, and Ph. 328, being the authorities cited at the bar. They may not be decisive for the affirmative, but they are decisive to establish that no courts or judge or author hitherto has intimated an opinion that there is no condition of seaworthiness in time policies.

The reason assigned for now deciding that time policies should

exempt from any condition of seaworthiness is, that there is a class of owners who wish to insure ships for a time, and who, by reason of the absence of the ships, have no means of knowing whether their ships are then seaworthy; and because this class of owners is without the requisite knowledge, therefore all persons choosing to insure for a time ought to be exempt from the condition which has been hitherto the basis of the contract of the insurer. This reason appears to be unsatisfactory on many grounds — first, considering the present facilities for communicating with all parts of the globe, the number of owners who wish to insure ships which have been long unheard of, and are in an unknown place, cannot be so great as to make it expedient to unsettle the principle of insurance for the purpose of gratifying such a wish; secondly, the owners so situated, if they choose to insure from the date of the last advice that the ship was seaworthy, have the same means of knowledge, and therefore ought to be subject to the same condition, as the owner who insures the homeward voyage upon information received from his agents abroad; and if they choose to insure from a later day, they ought to take the risk of the interval; and, thirdly, owners wishing to insure by a time policy, to begin from a time long after the last notice that the ship was seaworthy, may by an additional premium stipulate that the ship should be admitted to be seaworthy. These are the grounds I have to submit for answering in the affirmative to the first question.

My answer to your lordships' second question is, that the condition of seaworthiness applied to the 25th September. The contract of insurance commences at that time, and the condition is contained in or implied from the contract for the purpose of enabling the insurer to calculate the risk of a seaworthy ship from that time to the end of the insurance; seaworthiness at any other time appears to me irrelevant. I am not aware of any qualification material to the rights of the parties if seaworthiness has the meaning above attributed to it. It may not be superfluous to add, that, according to that meaning, in case of an insurance beginning in the course of a voyage, a ship which was seaworthy at the commencement of it would still be seaworthy, notwithstanding any loss by the ordinary accidents of a voyage, if the risk of reaching the port of destination in safety was not materially increased by reason of such loss. But if the ship was dangerously damaged before the commencement of the insurance, the condition would apply, and the policy would not attach. I think the plea valid. If all time policies are subject to a condition, it is conceded to be good; if no time policies are so subject, it is conceded to be bad. But if the law as to time policies is as was supposed in the judgment of the court below, and seaworthiness be understood as there explained, it is clear that all time policies are subject to some condition of seaworthiness. It is there supposed, that in case of policies commencing when ships are on their voyage, the condition is that they were seaworthy when they began the voyage, (the insurer being so made responsible for all damage in the course of the voyage prior to the beginning of his insurance,) provided the ship existed as a ship when it began. And if that be the true state of the

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law, it seems that it would have been less anomalous to hold, either that the risk should be said to have a qualified extension in such case to the commencement of the voyage, or that such a ship, if seaworthy at the beginning, should be taken, with reference to that insurance, to be seaworthy till the end of her voyage, than to hold that such policies stand on a different basis from all other policies, and that there is no condition in such a policy that the ship should be seaworthy at the commencement of the contract to insure. If either "risk" or "seaworthy" could be so understood, the plea would be good after verdict, as the judge must be taken to have so explained the law to the jury.

MAULE, J. It appears to me that the foundation of the admitted rule, that in a policy on a voyage there is an implied condition or warranty that the ship was seaworthy at the beginning of the voyage, is, that the parties to the policy are to be considered as contracting with reference to what is usual and of course in the transaction which is the subject of the policy; and that it is usual, and a matter of course, to make a ship seaworthy before the commencement of a voyage. It is clear that there is no such usage with respect to the seaworthiness of a ship insured for time, without any mention of place or voyage, at the commencement of the voyage, or at the time of effecting the policy; and in the absence of the usage, the condition or security does not arise. It may be, perhaps, contended that in a time policy the assured does warrant that the ship is seaworthy at the commencement of every voyage which may be undertaken during the time for which the insurance is effected. This question is not necessary to be determined in order to affirm or reverse the judgment in this writ of error, and I am not aware that it has ever been judicially raised. I am, however, of opinion, though with some hesitation, that there is no such warranty in such a policy as this, whatever might be the case in a policy differently worded. I think this policy resembles, in this respect, a policy on a ship on a voyage with leave to make intermediate voyages, in which case there is no warranty of seaworthiness respecting the state of the ship at the commencement of the intermediate voyages, supposing it to have been seaworthy at the beginning of the whole adventure. I therefore answer all your lordships' questions in the negative.

ALDERSON, B. My lords, in this case it seems to me that I shall best do my duty to your lordships by taking the first three questions together, and delivering my opinion on them. This is the case of a time policy, and these questions raise two points — first, whether in such a policy there is an implied warranty of seaworthiness; and, secondly, whether it is the same as that in a voyage policy, the effect and extent of which has been long settled by the decisions of our courts. It is clearly established that in a voyage policy there is an implied warranty that the vessel should be seaworthy, i. e. in a state, as to repair, equipment, and crew, such as to be able to encounter the ordinary perils of the adventure in which the policy states her to be

then engaged. If the policy on that adventure on the face of it states different stages in which the perils are different, then the implied warranty follows each stage, and requires that as each occurs the ship shall be seaworthy for that stage. But it is obvious that all these implied warranties arise, and arise justly, out of a state of the adventure mentioned expressly in the policy, and are regulated and modified by that which is expressed; so that both the assured and the underwriter must know, not only that they do so contract, but also the extent and modifications of the contract they then make. But if we propose to extend this law and these principles to a time policy, we shall immediately perceive how impossible it is to do so. The time policy is on the ship from the date stated in it, for a period therein fixed; it is no more. It is altogether silent as to the adventures in which the ship, during the insured period, may be engaged. How, then, is the implied warranty of seaworthiness to be known, as to its extent or modifications, from the contract itself?

Again: in a voyage policy the date at which the implied warranty of seaworthiness is to be fulfilled is the commencement of the adventure stated in the policy. The books, using unhappily, as I think, an ambiguous expression, often call this the commencement of the risk — correctly enough, no doubt, if it means the commencement of the risk of the assured in the adventure insured, either wholly or in part, by the underwriter; but incorrectly if it means the commencement of the risk of the underwriter, when he insures only a part of the risk of the assured, and begins his risk at a date in the course of the voyage: for the implied warranty of seaworthiness in the last case clearly does not date from the time of making the insurance, but from the commencement of the adventure in the course of which the insurance is made. But how strange and inapplicable is all this to a time policy. A time policy is the insurance of a part of the general risk of the owner, and for a given period. If it is to be referred back to the time when the owner's risk commenced, the implied warranty of seaworthiness would be fulfilled if the ship were seaworthy when the owner first possessed it, for then the risk first began. But this would be absurd. The other conclusion would be to refer it to some other period, without knowing where or in what situation the vessel was, or how engaged, at the time of effecting the insurance; and if so, to the commencement of some unknown adventure, which would have been expressed in a voyage policy. I conclude, therefore, that there is no analogy whatever between a time policy and a voyage policy as to this implied warranty of seaworthiness, and that all the cases as to voyage policies can do us no service in solving this question; and, indeed, there are no authorities, when the case is properly sifted, which really say so.

The high authority of Patteson, J., was cited; he indeed says, "I do not know of any distinction on account of the risk being for time." I think I have pointed out several. But in that same judgment he himself adds, that there is no authority for the position that the implied warranty of seaworthiness extends, in a voyage policy, to the making the owner responsible in cases where he admits him-

self able to do something necessary for the ship at every period of the **voyage** where that is possible. And yet, if there be any warranty of **seaworthiness** in a time policy, it can only be a warranty resembling **this** in principle, i. e. one which extends over the whole time insured, **and** which requires the owner to do all necessary repairs whenever it **is** possible for him to do so. Nor is the authority of Tindal, C. J., **to** be taken further than this, that at all events the warranty of seaworthiness in a time policy, if it exists, is not more extensive than **that** in a voyage policy. I am, therefore, of opinion, that, in the case **of** a time policy, the implied warranty of seaworthiness, being, as it **seems** to me, wholly inapplicable, is not contained in it, and that the **parties** in such policies should make express stipulations, by which **the** extent and proper modification of their contract may be intelligible and ascertained.

But I do not think it necessary for the determination of this case **that** this should be so. If we are to try to apply the general principles of insurance law, as it is by some said that we ought, to such a case, **and** to make *de novo* an implied warranty of seaworthiness in a time policy, I should adopt very nearly in terms, as the rule, the principle **well** expressed by Lawrence, J., in the case of *Christie v. Secretan*, 8 T. R. 192; adding to it, however, the qualification of Lord Mansfield in the case of *The Mills Frigate*. "The warranty of seaworthiness," says Lawrence, J., (speaking, however, of a voyage policy,) "**is** implied from the nature of the contract. The consideration for the insurance is paid in order that an owner of a ship capable of performing her voyage may be indemnified against certain contingencies, and it supposes the possibility of the underwriter gaining the premium." Lord Mansfield's suggestion of the impossibility of the owner knowing the state of the ship after she has set out on her voyage, adds the reasonable modification, and shows that this possibility of the underwriter gaining the premium must depend on the state **of the ship**, not at the time of the insurance being effected, but **at the commencement** of the voyage, when the owner, by himself or his agent, could know it and provide for it. This is the implied warranty in a voyage policy; if so, the warranty of seaworthiness in the time policy, if we are to apply these principles correctly, ought to be this — that there is in a time policy a warranty, that in whatever situation or adventure the ship may be during the period insured, **she shall**, whenever it is in the owner's power, by himself or his agents abroad, to make her so, be so fitted and repaired as to be able to withstand all the ordinary dangers to which she may by that situation or in that adventure from time to time be exposed; for it is only against the extraordinary risks of the ship that the insurance is made. On a voyage policy from a port, the ship must, therefore, be able, if she be seaworthy, to sustain the ordinary risk in that voyage. If insured at and from, she must be seaworthy at, i. e. sufficient for ordinary risks in port, and seaworthy from, i. e. fit for her voyage when she sails. The owner is always, and reasonably, presumed to have the means of doing this when at a port from or at which he insures, either by himself or some agent at that port. But

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after she sails that presumption ceases, and he is not subject to an implied warranty of seaworthiness during the whole voyage. Patten-son, J., says in *Hollingsworth v. Brodrick*, 7 Ad. & El. 44, and most correctly, that "there is no authority for saying that the implied warranty extends to making the owner liable, even when during the voyage he can do any thing for the ship, to do it at any period after the commencement of the voyage." Now, if this be the principle, and we try to extend it to a time policy, which is in truth a policy on the ship—it may be during many voyages, and at and from many ports—will it not be reasonable to put it thus? The ship insured on a voyage must be seaworthy at the commencement of the voyage in the course of which the risk commences. The ship insured for time is to be on various voyages and in various harbors during the time; she must then when on a voyage be seaworthy for those voyages, and when in harbor seaworthy for those harbors; but if the risk commences when on any voyage, she must be seaworthy as if insured on that voyage, i. e. at the commencement of it. If it commences when in harbor, and preparing for voyage, she must be seaworthy as if insured "at and from," as in *Forbes v. Wilson*, 1 Moo. 155. But how is it possible for any one to say what the implied warranty is, or what is its extent, until he knows the fact of the situation in which or the adventure on which the ship is employed at the time when the insurance is effected? There must, therefore, be an additional allegation to make it intelligible. This difficulty never can arise in a voyage policy, for there the adventure is mentioned in the policy itself, and in the declaration framed on it; to make, therefore, the implied warranty in a time policy intelligible and effective, such a statement must be introduced on the record by some definite allegation.

It is possible, no doubt, after that allegation is introduced, to argue with some plausibility that there may be an implied warranty, and an intelligible one, in a time policy. And this brings me to the fourth question put by your lordships, as to the validity of this plea; and it is on account of the defect in this plea that I think it is not at all necessary, in order to support this judgment, to hold that there is no implied warranty at all of seaworthiness in a time policy: for if the warranty does exist, still in this case it is wholly impossible to say what it means; as there is not on the record any statement at all of the situation of or adventure in which this ship was employed when the insurance was effected. I agree with what fell from Patten-son, J., in *Hollingsworth v. Brodrick*, where he says, "Supposing that in a time policy the assured were held to a warranty of seaworthiness at the commencement of each voyage during the time, the allegations should be shaped accordingly." Here the plea does not state whether the ship was or was not on a voyage when insured; if it had, the words, "not seaworthy at the commencement of the risk," and "not seaworthy at the time of insurance," and "not seaworthy on the 25th September," would properly have all of them then meant at the commencement of the risk in that voyage in the course of which the vessel was insured; and if she was seaworthy at that period, then the plaintiff would have been entitled to succeed. But it seems to me a

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good objection to the plea that there is nothing in it which can properly raise this, the true point in the case, at all. The plea, therefore, is, in my opinion, no answer to the declaration.

PARKE, B. The first three questions proposed by your lordships, as well as the last, were under the consideration of my brethren and myself, by whom the present case was decided in the Court of Exchequer Chamber; but as they were not necessary for the decision of the case in the court below, we disclaimed deciding upon them; nor were they argued there so fully, nor so much deliberated upon, as if they had been essentially necessary to the decision of the case itself. As your lordships have now proposed to us the first three questions in distinct terms, it is my duty to pronounce my opinion upon them, which I proceed to do, though not with quite so much confidence or satisfaction to myself as I should have done if they had been argued at the bar in the manner they would have been if essentially necessary to the decision of the question in the cause. That question was simply whether the fourth plea is valid; and the only point involved in that question is, whether there is an implied condition in every policy of assurance for time in the form of this policy, under all circumstances in which the ship shall be situated, that she should be seaworthy at the commencement of the term or the date of the policy. Unless there is, the plea is bad. I am of opinion that there is no warranty or implied condition that the ship was seaworthy at the commencement of the term; and, upon the best consideration I can give to the subject, I think I ought to advise your lordships that there is none that the ship was seaworthy at any particular time; that there is, in fact, no warranty of seaworthiness at all.

The whole of the law upon this subject depends upon one question, whether there is any sufficiently distinct and clear authority in the common law for annexing any condition of this sort to a policy of assurance for time. The policy is a written instrument, which contains a number of express stipulations; none on the subject of seaworthiness, for the notion that it was involved in the term "good ship" in policies is, I think, put an end to, for the reason stated in the judgment in the Court of Exchequer Chamber in this case, and has been entirely abandoned in the argument at your lordships' bar. If, then, there is any such warranty or condition, it must be added to the written policy, as an incident annexed to the contract, and that, either by the usage of trade or by the common law of the land, from the nature of the policy itself, there is no other way in which it can be added. The custom of trade, which is a matter of evidence, may be used to annex incidents to all written contracts, commercial or agricultural, and others, which do not by their terms exclude it, upon the presumption that the parties have contracted with reference to such usage, if it is applicable. This is explained in the case of *Hutton v. Warren*, 1 M. & W. 475. But in this case there is no evidence stated on the record of such usage; and none such can be supposed to exist, unless there be evidence of it. Such a condition may, however, be annexed, as a necessary incident, by the common law. The

simple question is, does the common law annex any such incident? An examination of the authorities, judicial decisions, and dicta, and text-writers on the common law, from which we derive our knowledge of that law, leaves us without any satisfactory proof that the same implied warranty or condition as to seaworthiness at the commencement of the risk, which confessedly is annexed to voyage policies, or any warranty or condition as to seaworthiness, is annexed to time policies.

In the common law of England, to be collected from these sources, there is ample authority that a warranty or condition of seaworthiness at the commencement of the risk is implied in all voyage policies, whether it has been adopted originally from the law merchant, or implied from the very nature of the contract itself. So other conditions are implied; as, not to deviate from the usual course of the voyage, to commence it in a reasonable time, to disclose all material circumstances; and the non-performance of these conditions avoids the policy, whether it arises from fraudulent motives or not. This is explained at length in the more accurate report of the judgment of the Court of Exchequer Chamber in 16 Queen's Bench Reports, 158, and the authorities there referred to, and they need not now be repeated. It is undoubted law that there is an implied warranty, with respect to a policy for a voyage, that the ship should be seaworthy at the commencement of the voyage, or in port when preparing for it, or had been seaworthy when the voyage insured had been commenced, if the insurance is on a vessel already at sea for the voyage, which voyage being commensurate with the risk insured, the warranty is compendiously described as a warranty of seaworthiness at the commencement of the risk; and this has led to the supposition that there is always such a warranty. It is also perfectly clear, that in our law there is no other warranty of seaworthiness in a voyage policy than that the ship is seaworthy at the commencement of the voyage. There is no warranty in the law of England that the vessel shall continue seaworthy after the voyage is commenced; none that the crew, if originally competent, shall continue so; none that the vessel shall be navigated with due care and skill during the voyage; none that pilots shall be taken on board at proper places, if the voyage has already commenced, unless, perhaps, where required by act of parliament; none, on an insurance for one voyage out and home, that the ship shall be seaworthy on her return voyage;—although these might all be very reasonable conditions to be imposed on the assured for the benefit of the underwriters, and which have been by law or custom imposed upon American underwriters; for in all these respects our law differs from the law of the United States, in which it is the acknowledged rule, that the assured must not only have his vessel seaworthy at the commencement of his voyage, but keep her so, so far as depends upon himself, during its continuance, and the underwriters are discharged from any loss which is distinctly shown to have arisen from the negligence or misconduct of the assured in not keeping the ship in a perfect state. The authorities

are cited by Mr. Arnould in his excellent book on Insurance, vol. 1, p. 666. The only warranty, then, as to seaworthiness in a voyage policy, recognized by our law, is, according to all the authorities, that the vessel was seaworthy at the commencement of the voyage. But it is equally clear that there is no satisfactory decision, dictum of a judge, or authority of a text-writer, that there is any such warranty of seaworthiness at the commencement of the term in a time policy.

The Court of Queen's Bench proceeded, in their judgment in this case, on two suppositions — first, that the opinion of all the lawyers in modern times was clear, that there was no difference between a time policy and one for a particular voyage, as to the implied warranty of seaworthiness; and that the same point was settled by the case of *Sadler v. Dixon*, 8 M. & W. 895, following that of *Hollingsworth v. Brodrick*, 7 Ad. & El. 40. The judgment of the Court of Exchequer Chamber states the grounds for holding that the Court of Queen's Bench was mistaken in both these respects. As to the first, the judges then present on that occasion were not, nor am I now, aware of any such prevailing opinion in the profession; and as to the opinion of text-writers, the authorities cited in the judgment show that this question was a matter yet unsettled. Mr. Arnould, after stating in vol. 1, p. 411, that a question has been raised whether the extent and meaning of the implied warranty is the same in a time as a voyage policy, states that the better opinion is that it is, but that the question will afterwards be fully discussed by him; and in p. 670 proceeds to discuss it, and intimates his notion as to time policies, that the implied warranty is that the ship should be seaworthy when she sails under the policy for the voyage or course of navigation on which it is contemplated to employ her during the term; and what that voyage is, is a matter of evidence. This is not the same proposition as that the vessel must be seaworthy at the moment that the term commences, wherever she may be, but quite a different one. He refers for that position to the case of *Alexander v. Pratt*, which came on in the Court of Exchequer on the 24th January, 1846, where a vessel was insured for twelve months from the date of her arrival at Sydney, in which the question was discussed, whether, when the vessel sailed on her intended voyage from Sydney, she should not be seaworthy for that voyage. He says that the court intimated its opinion that the vessel should be seaworthy for the voyage then intended; but the pleadings did not raise the question, and the cause was sent down to a new trial, with power to amend them in order to raise it; and the cause was settled. This case, in effect, decided nothing; and it was so little the subject of argument at the bar, that I have no note of it, though I have all cases of the least importance at that period.

Mr. Sergeant Marshall, (vol. 1, p. 151,) not having his attention directed to the distinction between time and other policies, lays it down that the ship insured must be seaworthy at the time of her sailing, not at the commencement of the risk; and the late Park, J., in his work on insurance, p. 450, states the time of insurance to be the period at which the vessel was to be seaworthy; certainly an

inaccurate proposition, and probably not intended to be so understood, as one of the authorities cited by him refers to the commencement of the voyage, and the other is a mere illustration of Lord Mansfield in *Carter v. Boehm*, 3 Burr. 1913, where the interest in a fort was insured for time, and his lordship said that the utmost that could be contended for was, that the underwriter trusted to the fort being in the condition in which it ought to be, in like manner as it is taken for granted that a ship insured is seaworthy; but at what time the fort ought to be in that state was quite immaterial upon the facts, as, in the opinion of the court, it was so at the time of the commencement of the term insured, and at the time of making the policy the fort was certainly lost. So that Lord Mansfield never could have meant to say that seaworthiness was necessary at the time of the loss. Mr. Phillips, an American author of repute, in his *Treatise on Assurance*, (vol. 1, p. 328,) does not appear to think this a settled point in America. He refers to the opinion of the American Chief Justice Shaw, who says, that whether the rule of seaworthiness would apply when the ship had been on a long voyage was a matter of doubt; and if it did, it must be understood with great latitude. *Paddock v. The Franklin Insurance Company*, 11 Pick. 227. So far, therefore, as relates to the opinion of the text-writers, the proposition, in the judgment of the Court of Queen's Bench, is by no means made out; nor is the judgment supported by either of the authorities referred to as deciding the question. In the first case, (*Hollingsworth v. Brodrick*, 7 Ad. & El. 40,) the plea was, that after the term commenced, and before the loss, the vessel became unseaworthy, and might have been repaired at a reasonable expense, and that the ship remained unseaworthy at the time of the loss; and the court decided that plea to be insufficient, being of opinion that a state of unseaworthiness during the voyage could not be a defence, unless, at all events, it was shown to be the cause of the loss, if, indeed, that would make any difference, as it would not. Nothing was decided as to there being an implied warranty in time policies, as a condition precedent to the policy attaching, or as to the time to which that warranty relates.

The only part of the case bearing upon the present question is a dictum of Patteson, J., in the course of his judgment, "that the implied warranty of seaworthiness is satisfied if the ship is seaworthy at the commencement of the risk," and that he does not "know of any distinction on account of the risk being for time." But the learned judge was evidently speaking with reference to that case, in which the question was, whether there was any implied condition as to keeping the vessel in repair after the term commenced; and if it meant more than there was no difference between a time policy and a voyage policy in that respect, and that there was a warranty or implied condition of seaworthiness at the commencement of the term, it is of less weight, because that question was quite foreign to that case, and did not arise at all in it. Nor did the case of *Sadler v. Dixon*, 5 M. & W. 205; 8 M. & W. 895, settle that point; on the contrary, the judgment of the Court of Exchequer expressly

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states the point to be unsettled; and it decided merely that the implied warranty was at least not more extensive than that on a policy on a voyage; and that if there was no contract for the conduct of the crew in one case, there was none in the other.

When this judgment of the Court of Exchequer was affirmed, Tindal, C. J., used some expressions which were contended before us to amount to an opinion that the implied warranty of seaworthiness was the same in a time and a voyage policy, and applied to the commencement of the risk. But it is clear from the context that no such position was meant to be positively laid down, but only that the obligation of the assured on a time policy was, after the policy attached, not more extensive than that on a voyage policy, and did not require the assured to keep the vessel in a seaworthy state. The period to which the warranty of seaworthiness attached was wholly immaterial in that case. The only other case cited before your lordships was that of *Hicks v. Thornton*, Holt, 30. That was a decision of Gibbs, C. J., at *Nisi Prius*, in a trial on a time policy on a whaling voyage, with liberty of cruising for prize; and he held that it was enough to satisfy the implied warranty of seaworthiness if, at the commencement of the time, the ship had a crew fit for one of the purposes, though unfit for the other. It may be inferred from the fact of Gibbs, C. J., leaving that case to the jury, that he thought that there was in a time policy an implied warranty or condition of seaworthiness of some sort at the commencement of the term for which the ship was insured. But the facts may not have made it necessary for him to give that question much consideration, as the plaintiff was likely to succeed even if there was such a warranty; and at all events it was no more than a *Nisi Prius* opinion; and as the decision was in favor of the plaintiff, and the propriety of it could not be questioned by a motion for a new trial, it is of so much less weight.

In this state of the dicta and decisions on the subject of warranties of seaworthiness on time policies, (and these are all,) it is impossible to say that they supply satisfactory proof that there is any warranty of seaworthiness at the time of the commencement of the term. The decisions distinctly show that there is none — that the ship is to continue seaworthy for the term. In truth, there is only one *Nisi Prius* decision in support of the proposition that there is such a warranty as to the commencement of the term. From the course the cause took it could not be afterwards questioned; and the dicta referred to are explained by the context, or extrajudicial. It lies upon those who seek to add another condition to a written contract, not expressed, where there is no evidence of usage of trade, to show that the law implied it. These authorities are of themselves, in my judgment, quite inadequate for such a purpose. If, however, precisely the same principle applied to both the case of a voyage and a time policy, if they were exactly analogous in this respect, less positive authority might be required, and it might be thought that these, at best slender authorities, would be sufficient. Perhaps even without them such a condition might be implied if the cases were similar, but they certainly are not. In a voyage policy the owner of a ship has, generally

speaking, the power to make the ship seaworthy at the commencement of the voyage. In the ordinary course of navigation, he always does so for his own sake; he is bound to do so for the safety of his crew, and for the safety of the cargo placed on board; he contracts with every shipper of goods that he will do so. If the shipper of goods be the assured, he has a right to expect a seaworthy ship, and may sue the ship-owner if he has not. Hence, the usual course being that the assured can and may secure the seaworthiness of the ship, either directly if he be the owner, or indirectly if he be the shipper, it is by no means unreasonable to imply such a contract in a policy on a ship on a voyage, and so the law most clearly has implied it. It may happen, indeed, in some cases, that, from the want of proper materials, of skilful artisans, of proper docks in the port of outfit, of sufficient funds or credit, or from the hidden nature of defects, the owner may not be able to fulfil the duty of making the ship seaworthy at the commencement of the voyage; but the law cannot regard these exceptional cases, "*ad ea quæ frequentius accidunt jura adaptantur*;" and it wisely, therefore, lays down a general rule, which is a most reasonable one in the vast majority of voyage policies, that the assured impliedly contracts to do that which he ought to do on and before the commencement of the voyage—that is, to make the ship seaworthy at the commencement of it, and in part, *quoad hoc*, in the preparation for it. The contract contained in the policy imposes on him no duties which were not incumbent on him before. But how different is, in general, the case of one who insures for a time. He does not necessarily know the position of his vessel at the commencement of the term; if the term commences whilst the vessel is absent from a port, he cannot, generally speaking, cause her thus to be repaired, and no care or expense of himself or agent could secure that object. The ship may have lost her anchor, or sails, or rudder; part of her crew may have deserted, or be dead of malignant fever. All these deficiencies, generally speaking, are such that no care or expense could have prevented or cured. How unreasonable, then, would it be for the law to hold that there was in every case added to a policy, which is silent on the subject, a condition which, in most cases, it would be impossible for the assured to fulfil. These considerations render a time policy essentially different from one on a ship.

It is a powerful argument against implying a condition of seaworthiness by a party who generally has it not in his power to fulfil it; nor is it a satisfactory argument that it ought to be implied in all cases where it actually is in the power of the party to do so; for the law usually acts by general rules, and the maxim which I have quoted is clearly applicable. Nor is it an answer to say that a more liberal construction of the term "seaworthy" in time policies might obviate this objection, and that a different degree of seaworthiness is sufficient for the completion of a voyage already begun than would be necessary for the entire voyage; that a ship which was in the commencement of the voyage perfectly seaworthy in respect of the state of her hull, equipment, and stores, would be still seaworthy for this

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purpose, though in the middle of the voyage, when the time policy should attach, her hull had suffered by wear and tear, her stores been diminished, or equipment deteriorated; for she still might be reasonably capable of performing the rest of the voyage. Doubtless this is true; but any laxity of the term "seaworthy" would not provide for the cases of losses of the anchors, rudder, or masts, or sails, or crew, or of irreparable sea damage, after incurring which no vessel could, in the most loose interpretation of the term, be considered as seaworthy. I therefore come to the conclusion, from these premises, that there is not, in the case of a time policy, an implied warranty or condition that the vessel was seaworthy at the commencement of the term insured. I feel no doubt that this condition cannot be implied.

I am equally clear that there is no implied warranty or condition that the ship insured shall be seaworthy at the date of the insurance. There is a total absence of all authority for this, if I except the part I have already quoted from Mr. Justice Park's book, and which is, for the reason above given, evidently an unintentional inaccuracy of expression. And, indeed, the expression in this policy, "lost or not lost," which means lost or not lost when the policy was effected, totally excludes all idea of an implied warranty or condition that the ship was then seaworthy. Two other cases of implied warranty or condition of seaworthiness may be suggested in which there is more doubt. One, that the ship was seaworthy at the commencement of the voyage, of which the time insured by the time policy was part; as, for instance, if the ship sailed on the 1st June, 1850, on a voyage from Liverpool to the East Indies and China and back—a voyage might probably last two years—and the time policy, being meant to cover part of that voyage, was from the 1st June, 1850, to the 1st June, 1851, would there be any implied warranty or condition that the ship was seaworthy when she sailed from Liverpool? Would there be any if the time policy expressly stated on the face of it that the time was part of that voyage; as, for instance, that the ship was insured from the 1st June, 1850, to the 1st June, 1851, on a voyage from Liverpool to the East Indies and China and back? Upon this question I cannot answer your lordships with so much confidence as upon the other. My opinion might possibly be qualified or altered by a more solemn argument, where those were the questions upon which the decision was to turn; but I answer them by saying, that it seems to me that there is no warranty in either case, for this short reason, because I cannot find any satisfactory authority in the law of England for annexing such an implied condition or warranty to a written insurance which *primâ facie* contains all the terms upon which the parties contract; though there is much more reason for implying such a contract than one of seaworthiness at the commencement of the term, inasmuch as it was competent, generally speaking, for the assured to secure the performance of such a condition—a condition of seaworthiness at the commencement of the voyage—and in the ordinary course of navigation he would do so. The absence of these

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implied warranties will not practically be attended with the mischief which it is said they are calculated to prevent.

In cases in which the assured wilfully permits the ship to sail, or knows that she has sailed, on the voyage of which the time policy covers part, in an unseaworthy state, the insurance would be void on the ground of the concealment of a material circumstance, and this will prevent the frequency of such an occurrence; and in all cases in which the underwriter wishes to be secure against such a contingency, he may take care to provide for it in the policy by introducing a warranty of seaworthiness at the commencement of the risk or voyage, which, however, would lead to a diminution of the premium. The answers to the first three questions will lead your lordships to conclude that my answer to the last question is, that the plea is clearly bad. The plea is in these terms — “That the said ship or vessel in the said declaration mentioned was not at the time of the commencement of the said risk in the said policy of insurance mentioned, nor at the making of the said insurance, nor on the said 25th September, 1843, in the said declaration mentioned, seaworthy, or in a fit and proper condition safely to go to sea, but, on the contrary thereof, was wholly unseaworthy.” The meaning of the term “commencement of the risk” clearly is the commencement of the risk which the underwriters are to take on themselves — the commencement of their liability — that is, the commencement of the term of insurance. If there was no implied contract or condition of seaworthiness at the commencement of the risk or term, (which is the same thing,) there was none of seaworthiness on the 25th September, and certainly none of seaworthiness at the date of the policy; for the policy is, “lost or not lost.” Therefore it is utterly immaterial whether the ship was seaworthy or unseaworthy at any of these periods, and the plea is clearly bad.

POLLOCK, C. B. Adverting to the record and proceedings in this case, I am of opinion that the policy is not subject to any implied condition or warranty that the ship was seaworthy. This is the plain obvious meaning of the language used by the contracting parties, looking to the policy alone. There is no such condition or warranty to be found in the policy itself. The use of the epithet “good,” applied to the ship, conveys no such warranty, as has been already observed by more than one of my learned brothers. And apart from any other consideration dehors the policy, this is, in my judgment, the construction which a court of law ought to put upon the contract entered into between the parties. It is a contract of indemnity against certain perils to which the ship may be exposed. Any fraud, or any concealment of any matter material for the consideration of the underwriter, would vitiate the contract. But it contains no condition or warranty as to the state of the vessel, as to which it is to be assumed that the assured knew no more than the underwriter; for if he did, and it were material, he would be bound to communicate it.

The arguments in favor of the opposite conclusion, namely, that

there is some condition or warranty of seaworthiness, are plausible, and at first sight not without apparent force; but I think they are not sound. As far as they are founded upon the public advantages of such a condition, and its tendency to protect the lives and secure the property of those who embark in marine adventures, I think they ought not to influence our judgment. Our duty is to expound contracts according to the lawful intentions of the parties who make them, expressed by the language they have used; and we are not at liberty to insert or imply a condition of seaworthiness, (on account of what we may deem to be its general importance or its beneficial public results) unless we are satisfied that such was the undoubted meaning of the contracting parties. But as far as they are founded on the established and now recognized usage, custom, or practice which has obtained among merchants and underwriters in all voyage policies, that there is an implied condition of seaworthiness, the opposing arguments are entitled to careful examination and attentive consideration. It is urged, that as in all policies of insurance for a voyage there is such a condition or warranty, therefore there ought to be, and it must be implied that there is, some such condition in a policy for time. No doubt, in the ordinary contract of insurance for a voyage, there is an implied condition or warranty that the ship was seaworthy when she sailed, if the voyage has begun; or shall be rendered seaworthy before she sails, if the voyage has not begun; and this condition is implied whether the insurance be on ship or goods. And if the case were put of an ordinary insurance for a voyage enlarged into an insurance for time, beginning the adventure or risk with the sailing on a certain voyage from a given port, and continuing for a given time, I should think there would be in such a case an implied condition that the ship was seaworthy at the time of her sailing on the voyage; and I should conclude that the commencement of the risk, by the sailing on the voyage, was introduced with the very object of thereby creating the implied condition. So, if such were the original terms of the policy, that is, if a time policy commenced, not with a day certain, but with the sailing of the ship on a particular voyage, the risk to be continued for a time certain, and not merely to the end of the voyage, I think it might reasonably be contended, without any special words of contract, that the known and established condition of seaworthiness at the commencement of the voyage ought to be imported into or implied in such a policy. Now, considering that time policies have been, to some extent, introduced instead of voyage policies, the latter having always some reference to some condition or warranty of seaworthiness, it is a very plausible suggestion that those who enter into contracts or policies for time must have some reference to some condition or warranty of seaworthiness, either at the commencement of the risk, or at the date of the contract, or at the commencement of the voyage, or at some antecedent period. But it appears to me to be so difficult to frame any condition or warranty that shall in all cases (perhaps in any) be analogous or equivalent to the well known condition or warranty in a voyage policy, that I think we are not justified in making a contract for the parties which they have not made

for themselves, even if we had more certainty than I think we possess that the contract in the new form was made with some reference to the long established condition or warranty which no doubt exists in the old form.

The condition or warranty of seaworthiness in a voyage policy has been long established and settled. The assured, in addition to the total absence of all fraud, (which the law requires in all contracts) — in addition to the fairest and fullest communication of every material circumstance that can affect the risk or contract, (which is not required in all commercial dealings,) is bound by an implied condition or warranty that the ship was seaworthy at the time of her sailing, or shall be rendered so before she sails; and he is bound by this condition, though he may have no means of knowing the fact one way or the other, and may have little or no personal control over the matter, which is generally the case in a policy on goods. And the question is, does this implied condition apply to a policy for time — a policy which takes up the vessel in port or at sea, employed or unemployed, earning a freight or seeking a cargo, undergoing repairs or encountering a storm — a policy which would no doubt attach to the vessel if she existed as a ship, though, abandoned by the crew to save their lives, she were speedily about to founder in the open sea, or to perish on a rocky shore? Now, what condition or warranty of seaworthiness can be presumed or implied in such a contract as this is, applying to and attaching under such a variety of circumstances? Can it be a condition or warranty of seaworthiness at the time of entering into the contract? In pursuing this inquiry, if the condition implied in a voyage policy be the ground and foundation of the argument that we ought to and must imply such a condition in a time policy, we must follow the analogy strictly. We are not at liberty to mould it and fashion it, to contract or expand it, as we may think reasonable, and adapt it to any varying circumstances that may come before us. Now, in a voyage policy, it is quite clear that there is no condition or warranty of seaworthiness at the time of entering into the contract. In a case of a voyage policy, the vessel at the time of the contract may have encountered perils which have rendered her utterly unseaworthy; nay, she may already have been lost. The analogy of a voyage policy, therefore, cannot justify our implying a condition or warranty of seaworthiness at the time of entering into the contract; but can we imply such a condition with reference to the time when the liability of the underwriters commenced — that is, the commencement of the time during which the contract of indemnity is to last? Here, again, all analogy fails. Put the case of a voyage policy of this sort. A ship is known to have sailed on the 1st January on a voyage to the East Indies. On the 1st February the owner proposes to ensure her, but only from that day, for the remainder of the voyage, taking upon himself the risk of antecedent loss or damage. Or a similar case may be put of the expression “lost or not lost” being left out of the policy. In such a contract there would be an implied condition that the vessel was seaworthy on the 1st January, when she sailed on the voyage, but not that she was seaworthy on the

1st February, when the underwriter's risk would commence. As, therefore, the analogy of a voyage policy will not justify our implying such a condition or warranty at the date of the contract or the commencement of the risk, it seems to me that the only form of condition or warranty that can with any semblance of reason be even suggested is, that the vessel was seaworthy, not at the time of the making of the contract, nor at the time of the risk commencing, but at some antecedent period, namely, at the commencement of some voyage, either that on which the vessel may be then sailing when the contract is made, or that on which she was sailing at the commencement of the risk, or the last antecedent voyage, or the next succeeding voyage, or all or any of them.

But how can any of these modes of implying a condition, even if they could be derived by analogy from a voyage policy, (which I think they cannot,) be applied to vessels employed in such short voyages as from Dover to Calais, or to vessels regularly sailing between any two ports put a few miles distant from each other; or engaged in a whaling voyage, which may last for years, though a time policy is allowed to endure for one year only; or to a ship that has been insured for time, and for time only, during the whole period of her existence? What voyage, in such cases, can be selected, at the commencement of which we can imply a condition or warranty of seaworthiness? Or is there such a condition as to every fresh voyage commenced by the vessel during the time? This, however, cannot be, for no such condition or warranty arises as to subsequent sailings in the case of a voyage policy; for if a ship be insured for several voyages in succession, all as one adventure — as if a ship be insured on a voyage from London to China, from China to Calcutta, and thence back again to London, with power to make, and the possibility of making, several intermediate voyages — in such a case it is quite sufficient that the vessel was seaworthy when she sailed from London, the commencement of the whole adventure; and her becoming unseaworthy afterwards, and sailing in that condition from an intermediate port, is no breach of the condition or warranty. To try the conclusion to be drawn from this with reference to time policies, let me put the case of a ship insured for time from the 1st January, 1851, to the 31st December, 1851, both days inclusive, and sailing on the 13th December, 1851, on a voyage from London to the Cape of Good Hope, and then at the end of the year a fresh policy for another year is effected with the same or other underwriters; in the case of the same underwriters, would there be in the new policy a condition or warranty of seaworthiness at the time of sailing on the voyage to the Cape of Good Hope, there being no such condition in the old policy? It appears to me very clearly not; and if so, neither would there be with a different underwriter, otherwise the same contract in words would have a different meaning, according as it might be made with the same or with different underwriters.

The result of all this satisfies my mind that an insurance for time is wholly irrespective of seaworthiness at any time whatever, and is effected merely on the footing of its being without fraud in perfect

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good faith, and with the fullest communication of all material circumstances. The truth is, the substance of the implied condition in a voyage policy is, that at the commencement of the voyage insured the ship was or shall be seaworthy, and there is no condition with reference to any antecedent or subsequent time, period, or event. If, therefore, an insurance be effected for time only, without reference to any voyage at all, I do not see how a court of law can imply any condition whatever of seaworthiness. And we must not overlook this, that it may be that this form or mode of insuring has been adopted for this very reason — that thereby the assured gets rid of a condition or warranty relating to a matter of which he may have no knowledge whatever, and over which he may have a very imperfect control. On the subject of the authorities I entirely concur with the judgment delivered by my Brother Parke in the court below. This point has never yet been decided, and so it was admitted by the counsel at your lordships' bar. It is a mistake to suppose that there has been any decision at all binding on a court of law as an authority on the subject, though there may have been expressions, *obiter dicta*, on the subject, entitled to great respect, which already have been stated by my learned brothers who have preceded me. We are, then, at perfect liberty, and indeed it is our duty, to consider the question upon principle; and I have endeavored to state the grounds upon which I have arrived at the conclusion, that my answer to your lordships' first three questions is, that in this case the policy is not subject to any implied condition or warranty of seaworthiness of any description whatever; and therefore my answer to the last question must be, that the plea, which is founded on a supposed implied warranty or condition of seaworthiness, is not valid in law, and is no answer to the action.¹

The further consideration of the case was, on the motion of the Lord Chancellor, adjourned.

June 3. The House now delivered its judgment.

LORD ST. LEONARDS. In this case the question arose on a time policy on a ship. The policy was dated in November, 1843, and the assurance was, "lost or not lost, in port and at sea, in all trades and services whatsoever and wheresoever, during twelve months, commencing on the 25th September, 1843." The record does not show under what circumstances the assurance was effected, nor where the ship was when the policy was issued. It was assumed in the argument that she was on her voyage. The risk was to commence as from a day past. In a voyage policy, where the contract shows the nature of the adventure, from which the intent of the parties may be

¹ The judges were therefore divided in their opinion, in the proportion of seven to two, Williams and Erle, Js., being in favor of implying the condition of seaworthiness; the other seven being against implying such condition.

collected, the law implies a condition of seaworthiness to perform the voyage. This has long been a settled rule; but no such rule has ever prevailed in regard to time policies. The Court of Queen's Bench in this case held that the implied warranty extended to time policies, as well as to policies for a voyage, and that the period to which the warranty applied was when the risk attached. Upon error in the Court of Exchequer Chamber, that judgment was reversed. The learned judges, whose opinions were delivered to the House, differed in opinion; but seven of those learned persons supported the view taken by the Court of Exchequer Chamber, whilst only two were of the contrary opinion. The opinion of the majority of the judges is that which I entertained at the close of the argument, and it has not been shaken by the arguments of the two learned judges who supported the view taken by the Court of Queen's Bench, for whose opinions, nevertheless, I entertain great respect.

Your lordships cannot imply a condition in this case, where there is nothing on the face of the contract to warrant it. Assuming the ship to be on a voyage, all analogy fails between the case of a voyage policy and a time policy; and the very argument in this case proves that seaworthiness is not an implied condition in a time policy, warranted by custom, and allowed by law. Neither party can be supposed to have known the state of the ship when the risk commenced, and therefore it will be unreasonable to imply a condition of seaworthiness at that period. In the case of a policy for a voyage, the condition implied is, that she is seaworthy at the commencement of the voyage, not that she shall continue so. If, therefore, a time policy upon a ship on a voyage were to be held to be subject to an implied condition, in analogy to the other case, it would seem to follow that the underwriter, who undertook to indemnify the assured from the period named, must take the risk of the state in which the ship then is. A voyage policy would have covered the voyage, and any unworthiness during the voyage would not have affected the policy. A time policy effected during the voyage should, I think, at all events, be held to cast the risk on the underwriter, just as he must have borne it at the period in question under a voyage policy. Analogy could not be carried further, if even the contract for time showed that the ship was on a particular voyage. It was admitted in argument, that the wear and tear of the ship on her voyage, previously to the commencement of the risk, must be allowed for in the implied condition of the seaworthiness. But where is the line to be drawn? If the assured was guilty of any fraud or concealment, that would of itself avoid the policy; and therefore the condition contended for in time policies is not necessary to guard against fraud or concealment. If the ship was lost after the commencement of the risk, namely, on the 25th September, 1843, and before the date of the contract, the underwriter was to be liable by the terms of his contract.

It is clear, therefore, that no conditions of seaworthiness at the date of the contract can be implied. Such a condition, therefore, if to be implied, could in this case only be implied as at the commencement

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of the voyage ; but there was no allegation as to any particular voyage, and courts of justice must act upon a rule general in its application. If, however, a ship were to sail on a particular voyage, and a time policy were to be effected instead of a policy on the intended voyage, as at present advised, I think that a condition would be implied that the ship was seaworthy at the commencement of the voyage. But that is not the case. Any supposed difficulty on the part of underwriters may readily be obviated by the insertion in time policies of an express warranty of seaworthiness at the commencement of the risk. I do not trouble your lordships with the state of the pleadings, because it is admitted that the view of the plaintiff in error cannot be maintained, unless there is an implied condition in every policy for time, like that in this case, wherever the ship may be, that she was seaworthy at the commencement of the risk, or at the date of the policy. No such condition can, I think, be implied, and therefore I advise your lordships to affirm the judgment of the Court of Exchequer Chamber, and dismiss the appeal, with costs.

LORD CAMPBELL, C. J. My lords, I entirely agree in the opinion of my noble and learned friend who presided on the woolsack when this case was argued at your lordships' bar, that the defendants in error are entitled to our judgment. The allegations in the plea of want of seaworthiness, although proved to the satisfaction of the jury, do not appear to me to constitute a defence to the action. I do not proceed upon the literal meaning of the word "seaworthy," which was contended for. Without regard to its literal or primary meaning, I assume it to be now used and understood to express that the ship is in a condition in all respects to render her reasonably safe wherever she happens to be at any particular time referred to, whether she be in a dock, in a harbor, in a river, or traversing the ocean. The question raised by this record is, whether, upon a policy of insurance on a ship for time, in the form of that set out in the declaration, there be an implied condition, that when the policy ought to attach and the risk to commence, the ship shall be seaworthy — that is to say, in a proper state of repair and equipment, with reference to the situation in which she shall then be. It is incumbent on the underwriter, who here denies his liability, to show that in every time policy there is such a condition, for neither the declaration nor the plea discloses any facts from which the condition is to be implied universally. There is no custom or usage of trade respecting time policies which we can take notice of; and after an examination of all the authorities which have been cited on the subject, I think it quite clear there are none to guide us. The two decisions mainly relied upon, of *Sadler v. Dixon*, 5 M. & W. 435, and *Hollingsworth v. Brodrick*, 7 Ad. & El. 40, have no application to the question of seaworthiness under a time policy at the commencement of the risk; and some casual expressions which may have dropped from learned judges when this question was not at all under their consideration, are entitled to no weight.

Nor do the American or continental jurists on the present occasion afford us any aid. The underwriter is therefore driven to contend, that because in policies on ships "from" or "at and from" a specified port to another specified port, or back to the port of outfit, (commonly called "voyage policies,") there certainly is such an implied condition, the same condition is to be implied in policies from a particular day to a particular day, without reference to the local situation of the ship when the risk commences or terminates, (commonly called "time policies.") With regard to voyage policies, we have usage and authority establishing the implied condition as certainly as any point of insurance law. These being wanting, as to the extension of the doctrine to time policies, the reasoning must be, that, as far as this condition is concerned, the contract by time policies rests on the same principles, and that no distinction can be made between them. The condition may have been implied in voyage policies from considering that probably both the contracting parties contemplated the state of the ship when the risk is to begin; that this state must be supposed to be known to the ship-owner; that he has it in his power to put the ship in good repair before the voyage begins; that to prevent fraud; and to guard the safety of the crew and the cargo, this obligation ought to be cast upon him ere he can be entitled to any indemnity in case of loss; and, above all, that this implied condition in voyage policies is essentially conducive to the object of marine insurance, by enabling the ship-owner, on payment of an adequate premium, and acting with honesty, and exercising reasonable diligence, to be sure of full indemnity in case the ship should be lost or damaged during the voyage insured. But time policies are usually effected when the ship is at a distance, the risk being very likely to commence when she is actually at sea. Under these circumstances, is it at all likely that either party would contract with reference to the actual state of the ship at that time, with respect to repairs and equipment? The ship-owner probably knows as little upon this subject as the underwriter. Any information which he has received tending to show that the ship is in extraordinary peril, he is bound to disclose, or the insurance effected by him is void. But is it reasonable to suppose that he enters into a warranty or submits to a condition which may avoid the policy with respect to a state of facts of which he can know nothing? We must further consider that in many instances he may have no power to perform this condition. Above all, if this condition were implied in time policies, their object might often be defeated, and the ship-owner, acting with all diligence and with the most perfect good faith, might lose the indemnity for which he bargained, and might become a bankrupt. Take as an example the policy on the ship Susan from the 25th September, 1843, to the 24th September, 1844; she may have been then employed in the south sea fishery; she may have sailed from an island in the beginning of September, 1843, in all respects in a seaworthy state, but before the 25th day of the month, she may have encountered a gale of wind, in which her sails may have been carried away, and the master may have died of a malig-

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nant fever. But she touches at another island on the 28th September, is completely reëquipped, takes on board a new master of competent skill, and prosecutes the adventure. Afterwards, and before the 24th September, 1844, she is crushed between two icebergs. For any thing that appears on the record, such may have been the history of the Susan; and these facts are consistent with all the allegations in the declaration and in the plea. On this hypothesis, the ship was not seaworthy when the risk was to commence, namely, on the 25th September, 1843. If there be a condition that she should then be seaworthy, the policy neither attached then nor at any subsequent time, and the owner's only remedy would be to recover back the premium he had paid to the underwriters. Thus your lordships are called upon to imply a condition which the parties could not have contemplated, which the assured had no power to perform, and which would effectually defeat the object of the contract.

If the loss is caused by any culpable negligence of the ship-owner, this may be a defence to the underwriter; but the ship-owner, acting with good faith and reasonable diligence, it is surely much more according to the principles of insurance law and common sense that the risk of the ship not being seaworthy when the liability of the underwriter ought to begin, should be cast upon him, who can easily indemnify himself by demanding an adequate premium. The only consideration pointed out for extending the implied condition of seaworthiness to time policies which made any impression on me is, that it does extend to voyage policies on goods, although the assured have no control over the repairs or equipment of the ship; but as between the assured on goods and the underwriters, the ship-owner must be considered the agent of the assured, and he undertakes that the ship shall be tight, stanch, and strong, and every way fitted for the voyage. If this undertaking is broken, the merchant has no remedy against the underwriter, but he obtains a full indemnity by suing the ship-owner, and between the ship-owner and the underwriter he is secure; so that the implied condition in his policy in no respect interferes with the object of insurance, or with the interests of commerce.

If your lordships shall be pleased, on the motion of my noble and learned friend, to affirm the judgment of the Exchequer Chamber in this case, it will be definitely established, that by the law of England, in a time policy such as this, no special circumstances being stated in the declaration or the plea, respecting the situation or employment of the ship, there is not an implied condition that the ship shall be seaworthy on the day when the policy ought to attach.

The other questions which were debated at the bar, and which were propounded to her Majesty's judges, must be open for judicial consideration when they arise; but as your lordships consider it expedient, for general information, and for the advantage of the commercial world, that opinions should be given upon this very important subject, although they would not be binding, I think it right to say, that, after great deliberation, I agree with those judges who think

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that in a time policy there is no implied condition whatever as to seaworthiness. I never for a moment could concur in the notion that there was an implied warranty that the ship was seaworthy when she sailed on the voyage during which the policy attaches. To lay down such a rule would, I think, be a very arbitrary and capricious proceeding, and, being wholly unsanctioned by usage or by judicial authority, would be legislating, instead of declaring the law. I likewise think that it would be very inexpedient legislation, as constant disputes would arise in construing the rule; for in fishing adventures, and where ships are employed for years in trading in distant regions, from port to port, the instances in which time policies are chiefly resorted to, there would be infinite difficulty in determining what was the commencement of the voyage during which the policy attaches. There would be a similar difficulty, as to the *terminus ad quem*, in considering what the voyage truly is for which the ship must be fit.

I have hesitated more upon the question, whether, when a time policy is effected upon an outward-bound ship lying in a British port where the owner resides, a condition of seaworthiness is to be implied. This might be an exception to the general rule, that in time policies there is no implied warranty of seaworthiness; and it is free from some strong objections to the condition of seaworthiness being implied where the risk is to commence abroad. But in addition to the objection that as yet there has been no implied condition of seaworthiness in any time policy, and that the general rule being against the condition, as it seems to me — having the most sincere and perfect deference for the opinion of my noble and learned friend on this point, in which I do not agree — this would be a gratuitous and judge-made exception to the rule, and I think it more expedient that the rule should remain without any exception; and, as at present advised, I should decide against the implied condition in all cases of time policies. There is a broad distinction which may always be observed between time policies and voyage policies; but when you come to subdivide time policies into cases where the ship is in a British port, and where she is abroad, and still more, if the residence of the ship-owner is to be inquired into and regarded, there would be a great danger of confusion being occasioned by the attempted classification. It is most desirable, therefore, that, in commercial transactions, there should be plain rules to go by, without qualification or exception. Marine insurance has been found most beneficial as hitherto regulated, and I am afraid of injuring it by new refinements. I should be glad, therefore, if it were understood, according to my present impression of the law, that, in all voyage policies there is, and in no time policies framed in the usual terms is there, a condition of seaworthiness implied. This rule, I believe, is adapted to the great bulk of the transactions of navigation and commerce; and where any case occurs to which it is not adapted, this may be easily provided for by express stipulation. My observations upon this last point I must offer with the greatest deference, after what has fallen from my noble and learned friend, for whose opinion

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on all subjects within the whole range of the laws of England I entertain the most sincere respect. I am glad to think that one important question of insurance law is now finally settled, and that your lordships are likely to decide this with entire unanimity.

Judgment of the Exchequer Chamber affirmed, with costs

CASES
HEARD AND DETERMINED
BY THE
JUDICIAL COMMITTEE AND LORDS
OF
THE PRIVY COUNCIL,

DURING THE YEAR 1851.

CHARLES GREVILLE, *appellant*, and EDWARD TYLEE, *respondent*.¹

February 6, 7 and 8, 1851.

*Interlineations and Erasures in a Will — Execution — Presumption —
Onus Probandi.*

By the Statute of Wills, 1 Vict. c. 26, s. 1, obliterations, interlineations, or other alterations in a will, after execution, are void, if not affirmed in the margin, or otherwise, by the signature of the testator, and the attestation of witnesses.

The mere circumstance of the amount, or the name of a legatee, being inserted in different ink, and in a different handwriting, does not alone constitute an obliteration, interlineation, or other alteration, within the meaning of the statute, nor does any presumption arise against a will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been superinduced by other writing. In such circumstances, the *onus probandi* lies upon the party who alleges such alteration to have been done prior to execution, to prove by extrinsic evidence, that the words were inserted before execution, and that they had the sanction of the testator.

In the absence of proof, that certain words in a will, written with a different pen and in a

¹ 7 Moore's Privy Council Cases, 320. On Appeal from the Prerogative Court of Canterbury. Present, Mr. BARON PARKE, the Right Honorable Dr. LUSHINGTON, the Right Honorable THOMAS PEMBERTON LEIGH, and the Right Honorable Sir EDWARD RYAN.

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different ink, and in a different handwriting, partly upon an erasure, were inserted prior to execution, so much of such will, consisting of the inserted words, which constituted a reversionary disposition, pronounced against.

The case of *Cooper v. Bockett*, 4 Moore's P. C. Cases, 419, considered and approved.

Where a will is prepared and written by a medical man in attendance on a testatrix, at that time dangerously ill, and without professional advice, by which he is made the principal object of the testatrix's bounty, to the exclusion of her near relations, a court of justice, regarding the subsisting relation of a medical man and patient, will view his conduct with the utmost jealousy.

The rule in pleading "*Qui ponit fatetur*," must be received with some modification. It must be rigidly enforced with respect to every averment made by a party alleging within his own personal knowledge, but the same rule must be applied less stringently, and in some instances rejected, when the party states facts not within his personal knowledge.

EMMA BLAGUIRE, widow, the testatrix in the cause, by her will dated the 29th of January, 1847, (but in fact executed on the 30th of that month,) appointed the respondent, Edward Tylee, and another person, (since deceased,) her executors. The will, after bequeathing certain specific legacies proceeded thus:—"And I give the remainder of my property to," the word "to" was struck out with a pen; and then followed these words:—"in the Long Annuities & elsewhere, to Charles Greville, M. D., Bath." From an inspection of the will it appeared, that this residuary clause was inserted below the sixth line from the top of the first side or page of the will, partly on an erasure, and partly as an interlineation. The name and description, "Charles Greville, M. D., Bath," was in the testatrix's handwriting. The rest of the will, and the interlineations, being in the handwriting of the appellant, who was the medical adviser of the deceased. The will was executed by the testatrix when dangerously ill. The testatrix died on the 4th of February, 1847.

The executors admitted the validity of the will generally, but contended, that the words constituting the residuary clause, under which the appellant was largely benefitted, (the greater part of the testatrix's property being invested in the long annuities,) were not entitled to probate. This clause formed no part of the instructions given by the testatrix for her will.

The question upon the appeal was with respect to these words of disposition of the testatrix's property, whether they were inserted in the will at the time of her executing it, or afterwards.

The proceedings in the Prerogative Court originated by a decree, issued at the suit of the executors, calling upon the appellant to propound the above words and names in the residuary clause, or to show cause why probate of the will, without those words and names, should not be granted to them. The appellant brought in an allegation and propounded the words:—"In the Long Annuities & elsewhere, to Charles Greville, M. D., Bath," as the residuary legatee named in the will, as a substantive part thereof. The executors then brought in an allegation, praying that the court would pronounce against the force and validity of the residuary clause, and decree probate of the will to be granted to them without such words and names.

Witnesses were examined on both sides, upon these allegations:

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the nature and effect of their testimony is stated and commented upon in the judgment.

On the 9th of August, 1849, the Judge of the Prerogative Court (Sir Herbert Jenner Fust,) by his final interlocutory decree, pronounced against the force and validity of the words and names, "in the Long Annuities & elsewhere, to Charles Greville, M. D., Bath," inserted below the sixth line, from the top of the first side or page of the will, and decreed the word "to," appearing struck out in the seventh line from the top of the first side of the will, to be reinstated, and decreed probate of the will without the words, "in the Long Annuities & elsewhere, to Charles Greville, M. D., Bath," to be granted to the respondent, the surviving executor, and condemned the appellant in costs.

Against this decree the present appeal was brought.

The appeal was argued by

Rolt, Q. C., and Dr. *Addams*, for the appellant; and

Turner, Q. C., and Dr. *Haggard*, for the respondent.

The question submitted by the appeal turned principally upon the evidence of the attesting witnesses, whether the words propounded in the allegation by the appellant, were inserted at the time of execution or at a subsequent period. The cases of *Knight v. Clements*, 8 Adol. & Ell. 215; *Clifford v. Parker*, 2 Man. & Gr. 909; *Cooper v. Bockett*, 4 Moore's P. C. Cases, 419; and the statute, 1 Vict. c. 26, s. 21, were cited upon this point.

As to the validity of the bequest to the appellant, the testatrix being dangerously ill at the time of the alleged execution, and influenced by the appellant, her medical attendant and the maker of the will, who was largely benefitted by it, *Segrave v. Kinsan*, 1 Beat. 157; *Bulkley v. Wilford*, 2 Cl. & Fin. 102; *Barnesly v. Powel*, 1 Ves. Sen. 119, 283; 1 H. L. Cases, 191; *Allen v. Macpherson*, 5 Bea. 469, 1 Phillips, 133; *Barry v. Butlin*, 2 Moore's P. C. Cases, 480; and "*Code Civil*," Liv. III. tit. 2, s. 909, were referred to.

The case stood over for judgment, which was afterwards delivered by

The Right Hon. Dr. LUSHINGTON:— This is an appeal from the Prerogative Court of Canterbury. The testatrix is Emma Blaguire, widow, who died on the 4th of February, 1847. The will, respecting a part of which the present suit arose, is dated the 29th of January, 1847. The question between the parties is, as to whether certain words should be admitted to probate or not? The parties are; Dr. Greville propounding the words, the executors opposing. The disputed words are, "in the Long Annuities & elsewhere, to Charles Greville, M. D., Bath." The court below has, by its decree in August, 1849, rejected these words, without which the residuary clause is inoperative. Dr. Greville has appealed.

Though the deceased died on the 4th of February, 1847, no pro-

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ceedings were had by either party till the 11th of July, 1847, when the executors called upon Dr. Greville to propound these words, if he thought fit, otherwise to show cause why probate should not be granted without them.

It was competent to either party to have instituted proceedings for the purpose of having this question decided immediately after the death of the testatrix. No reason appears why this was not done; the consequence is, that in a case where much may depend upon the accuracy of witnesses speaking to circumstances in detail, the first of the witnesses was not examined till December, 1847, ten months after the death of the testatrix and the transaction respecting which they were to give evidence. If this evidence be not given with the precision it might have been, if taken at an earlier period; if either party suffer from this course, it must be remembered this evil is attributable to their own laches.

In order to understand clearly the proceedings and evidence in this suit, it may be well to look first at the paper itself; to consider its present appearance, and the legal results arising from its state and condition.

It is admitted that the will is in the handwriting of Dr. Greville, except the words "Charles Greville, M. D., Bath," at the close of the residuary clause, which it is admitted are in the handwriting of the testatrix.

Dr. Greville has examined Mr. Netherclift as to the state of this paper, and he, being a lithographic artist of experience, is competent to perceive more accurately than a common observer, what the state and condition is. Mr. Netherclift states, "That the said writer appears to have written the said will with a quill pen, from the beginning to the word 'to,' now struck through with ink." That the word "to" is struck through, is apparent. He then deposes to his belief that the remainder of the first page of the will, and from the name "Mary Tylee," on the second side, down to the name of "Mrs. Burgess," was written with a quill pen, but that the amounts and figures, and the whole of the rest of the will (except the abbreviation and words "& elsewhere to,") appear to have been written with a steel or metal pen. He says, the writer appears to have adopted a steel pen in the course of writing the second page, and to have written the words "Long Annuities to" with such pen. This word "to" appears to have been erased. He concludes his evidence in chief, by saying, "With regard to the abbreviations and words ' & elsewhere to ' the same appear to have been written after the insertion of the words ' Charles Greville, ' and to have been so written as an after consideration; they appear to me to have been written with a quill pen, and paler ink, than the aforesaid words, ' in the Long Annuities. ' "

We are not now comparing this evidence with Dr. Greville's allegation; we are only looking to this evidence as a description of the state of the will; such description of it as any of us would give, if we could view it with the same accuracy and power of discrimination as Mr. Netherclift.

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The result, according to this evidence, is, that the body of the will, speaking generally, was written with a quill pen; the words "in the Long Annuities," subsequently, with a metal pen; the words "& elsewhere to" subsequently, to the words "Charles Greville," with a quill pen.

Now, if this be so, the first consequence which might probably follow is, that as the words "in the Long Annuities" and the words "& elsewhere to" were written with different pens and different ink, they were not part of one and the same continuous act, or done at the same time. Secondly, that as the words "& elsewhere to" were written after the words "Charles Greville," the writing that name by the testatrix gives no sanction or authority to them. Whatever may be the effect of this evidence, Dr. Greville cannot repudiate it, for he has produced Mr. Netherclift as his witness, and that, too, when Mr. Netherclift had previously inspected the paper in the registry, and made *fac similes* thereof: indeed, Mr. Tylee had previously shown the will to him. On the third interrogatory, Mr. Netherclift deposes, as in truth he had before deposed, that the word "to" had been erased, and a part of the "& elsewhere" written thereon, and further, that the erasure had been done with a knife.

Bearing these circumstances in mind, we will now consider what effect is to be attributed to them with reference to the statute of wills, 1 Vict. c. 26, and the 21st section of that statute. That section relates to obliteration, interlineation, or other alteration in the will after execution: all such are void, if not affirmed in the margin, or otherwise, by the signature of the testator, and attestation of witnesses.

It will be recollected that these words of the statute apply only to acts done after the execution of the will. But how is this to be ascertained, whether such acts appearing on the face of the will were done before or after the execution? On whom is the *onus probandi* thrown, and under what circumstances?

It is not a mere difference of ink or handwriting, which would constitute any of the acts done according to the true meaning of the statute. The mere circumstance of the amount or name of the legatee, inserted in a different handwriting and in different ink, would not alone constitute an obliteration, interlineation, or other alteration. Blanks may be supplied, and in a different ink, because the will may very probably be brought with blanks to the testator, and then filled up; no presumption could arise in such a case against the will having been executed as it appears.

But the case is different when there is an erasure apparent on the face of the will, and when that erasure has been superinduced by other writing. In such a case there is an obliteration and something more, which constitutes an alteration, and then the question arises, whether this was done before the execution of the will or not? We apprehend it to be now settled, that whoever alleges such alteration to have been done before the execution of the will, is bound to take upon himself the *onus probandi*, *Cooper v. Bockett*, 4 Moore's P. C. Cases, 419, followed and approved of by Lord Cranworth, in *Simmons v. Rudall*, 1 Sim., n. s. 137; s. c. 2 Eng. Rep. 97.

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It has been argued that this rule applies only to the word erased, and the words superinduced, and that it does not apply to the preceding words of the sentence, viz., the words "in the Long Annuities;" and it is true, that if this case was to be decided with reference to the statute only, the mere fact of the words "in the Long Annuities" being in different ink, would not constitute an obliteration, interlineation, or alteration, within the meaning of the 21st section, and, consequently, the *onus probandi*, with reference to the statute, would not be thrown upon the party propounding; but there is another question in this case, which would have arisen if the statute never had passed; namely, to what words and what bequest the testatrix intended to give effect, by inserting the words "Charles Greville, M. D., Bath;" of what did she know and approve of, when she executed the will. To try this question properly, we think that the case cannot be so divided; it must necessarily be taken as a whole: and, consequently, finding an alteration made after the signature of the testatrix, and that the words preceding, "in the Long Annuities," were written with a different pen and at a different time from the body of the will, we must inquire whether they had the approval and authentication of the Testatrix with reference to all the facts.

With regard to the fulfilment of the requisites of the statute, the first proof is the evidence of the attesting witnesses; but the fact that the words in question were in the instrument prior to the execution, may be proved by any other legal evidence.

Hitherto we have spoken chiefly of the requisites of the statute, but there are other principles which ought never to be lost sight of, in this or any other similar case. Dr. Greville, who insists upon the validity of this residuary clause, and claims to be entitled to about 4,000*l.* out of the 5,000*l.* of which the deceased died possessed, is the writer of the will; he was the physician of the deceased, at that time in attendance upon her, who (though her capacity is not denied) was, at the period of making this will, suffering under a complication of disorders, which terminated her life within six days. After its date we think that the principles applicable to the case of a person "*qui se scripsit hæredem*," apply here, and that according to the doctrine laid down in *Barry v. Butlin*, 2 Moore's P. C. Cases, 480, under circumstances like these, the *onus* of proving that the deceased knew the act she was doing, must fall upon the party benefited; he must prove that the testatrix knew and understood the act to which validity is to be ascribed; whether it be the whole residuary clause, or only the first member, viz., "in the Long Annuities."

It may be, that sometimes the application of the principles which must govern in all cases when the writer of the will is the person benefited, and when also the relation of physician and patient subsists, may bear hard in an individual instance; but however that may be, they are principles which we are bound to observe for the protection of all, against fraud and the exercise of undue influence.

We next proceed to examine the allegation given in by Dr. Greville; but before we apply ourselves to the consideration of its consideration of its contents, it may be well to state some of the rules

applicable to allegations generally, but especially in this case. One of these leading rules is, "*Qui ponit fatetur*," or in other words, that whoever avers a fact as true, cannot afterwards deny it; it must be taken as true against the person who alleges it: but this rule must be taken with some modification. It must be rigidly enforced with respect to every averment made by the party alleging within his own personal knowledge, but the same rule must be applied less stringently, and in some instances rejected, when the party states facts not within his personal knowledge, as to which he has not the means of acquiring correct information. Again, it is not incumbent on a party to prove his whole allegation, but only so much as is essential to support his case; but the facts essential to the case must be proved, and the court cannot, because a part is proved, assume the rest, provided that rest be essential: what is or is not essential, depends upon each case.

We now come to Dr. Greville's allegation. The first article states the acquaintance of Dr. Greville with the testatrix for more than ten years, her regard and affection for him, her desire to live in the same house with him, his medical attendance, and her gratitude. Without detailing the evidence produced to prove this article, we will assume it to be proved.

The second article pleads, that the testatrix kept up but little intercourse with her relations; that she took no interest in their welfare; said they were well off, and that she did not mean to leave them any of her property; that she sometimes said she would leave it to those who were kind to her; at other times, that she would leave it wholly, or in part, to Dr. Greville; that she expressed herself to that or the like effect, to the witnesses Jane Knight and Emily Knight, shortly before her death.

We must see the evidence on this article, and consider its probable effect on the main question in the cause.

Upon this second article, Mr. Watts, a chemist at Bath, deposes, "the deceased spoke to me of 'her brother' and her 'relations'; she never said any thing to me against her brother, but used a remark to me, that he was well off, and that he did not want any thing, but of her other relations she spoke as if she hated them. I have heard her say of them that they did not care for her, and that they should not have her money. She repeatedly gave me to understand, that she meant Dr. Greville, at her death, to have all she possessed; I forget her words, but she spoke so often and so decidedly to me to that effect, that I advised Dr. Greville to take care, and see that she made her will." Some declarations, though not so strong, were made to the witness, Maria Bedgood, by the testatrix.

Emily Knight, who saw the deceased during the latter part of her life, (in 1846,) deposes to similar declarations made by the testatrix, as to her relations; that "she should leave her property to those who were most kind to her, and also to Dr. Greville." The witness understood her to say, that, "after the legacies were paid to the legatees, she meant Dr. Greville should have the rest of her property, because he had been most kind to her, and her greatest

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friend." Mrs. Knight, the mother of this witness, deposes nearly to the same effect.

In addition to this evidence, the script No. 4, and which is in these words : " Bath, April 22, 1842. — Sir, Please to pay at my death all the money you have in your hands of mine to Charles Greville, widower, of the parish of Walcot, city of Bath, county Somerset. Emily Blaguire. (Addressed) John Fawkenor, Esq., Solicitor 8, Gray's Inn Square," may be referred to ; from which it appears, that so early as April, 1842, the testatrix intended to confer a benefit upon Dr. Greville at her death ; she here directs her solicitor, Mr. Fawkenor, to give all the money he had in his hands of hers, at her death, to Dr. Greville.

Without at present referring to the evidence given by Mrs. Barnes, who is produced by the executors, the result of the evidence adduced by Dr. Greville is, that the testatrix entertained a very great regard and affection for him, that she made declarations of her intention not to benefit her relations, but, after giving some legacies, to bequeathe to him the whole or greater part of her property.

The sixth, seventh and eighth articles of the allegation given in on behalf of Dr. Greville, relate to what is called the *factum* of the will. It is necessary, however, to premise, that the testatrix had been residing, since the autumn of 1846, at the house of Miss Mechi, near Notting Hill, and that her illness becoming very serious, she sent for Dr. Greville, from Bath, to attend her ; that he arrived on the 28th of January, and on the 30th accompanied her back to Bath. The will in question, though dated January 29th, was executed on the 30th.

As the next question for inquiry is, whether it be proved that the words in the residuary clause, " in the Long Annuities & elsewhere to " were inserted in the will prior to the execution, it will not be necessary, in this branch of the inquiry, to go into a very minute detail.

The sixth article pleads, that Mrs. Barnes, on the 29th (that is, the 30th) of January, gave to Dr. Greville the script No. 1, and requested him, as from the testatrix, to write out or prepare a will for her, pursuant thereto, and which he proceeded to do partly from the script and partly from the dictation of Mrs. Barnes both by reading to him the script, which he had some difficulty in deciphering, and otherwise. That in writing the will, he was in part verbally instructed by the testatrix, who was in an adjoining room, and to whom he referred for that purpose, to wit, as to her executors, whom she named, as to some specific legacies, and as to the blank opposite his own name, which she desired should be so left.

On this article, Miss Mechi has been examined ; the first part of her evidence relates to what occurred on the day preceding the execution of the will ; it is comparatively of little importance, so we proceed to her statement of what occurred on the next day. After detailing what was done by Miss Fawkenor (now Mrs. Barnes) and Dr. Greville, in the absence of the testatrix, she, the testatrix, said, when she was dressed, " Tell Dr. Greville he may come in now ; I told him so, and he came into the front parlor, without Mrs. Barnes, and remained with the deceased for a minute or two. During that

minute or two the deceased wrote a name on the paper which Dr. Greville brought with him into the front parlor; that was all that passed. I remained present during the time; nothing was then said to or by the deceased, about her executors or about any legacy, or about any blank opposite to Dr. Greville's name in her will. I am quite certain that not one word then passed between the deceased and Dr. Greville about any thing of the kind." This witness afterwards states that Dr. Greville did not see the deceased again, till half an hour after, when the will was executed.

It is perfectly obvious, that Miss Mechi, instead of proving by her evidence the main facts pleaded in the sixth article, negatives them. Baldwin, a girl at the age of thirteen, when examined, is designed to prove this article, but her evidence is of no weight. The article, so far as the evidence of the witnesses produced on behalf of Dr. Greville extends is, as to the principal averments contained in it, unproved.

The seventh article of this allegation contains averments of the greatest importance to the decision of this cause. It does not admit of abbreviation. It is as follows:—"That the will of the said testatrix having been so in part written out by the said Charles Greville, as aforesaid, was by him taken to the said testatrix, then in the next room, as aforesaid, and at which time the seventh line of the first side of the said will terminated with (or rather consisted of) the word 'to' (now struck through,) and without the two first legacies now appearing on the second side of the same. That the said testatrix then with her own hand wrote the names, initials and word herein (with others) propounded, to wit, 'Charles Greville, M. D., Bath,' now appearing on the first side of the said will, the said Charles Greville having first, at her suggestion, in consequence of it occurring to her, or of her remarking, that she had property in the Long Annuities, struck through the word 'to,' therefore constituting the seventh line of the first side of the said will, as aforesaid, and adding the words 'in the Long Annuities to,' the four first words being four of the words herein propounded; the said testatrix, in or whilst so writing the said names, initials, and word, saying or declaring that the insertion of his, the said Charles Greville's, name, as a specific legatee (intended) had so been by her directions, in order to veil or conceal her intention of making him her residuary legatee, or to that very effect. Also that at such time, by the direction of her, the testatrix, the said Charles Greville put in or inserted the two first of the (specific) legacies, now on the second side of the said will; and in consequence of a further remark of the said testatrix, that she had other property than that in the Long Annuities, at her suggestion partly erased the word 'to' then standing after and in a line with the words 'Long Annuities,' and adding thereto the abbreviation and word '& elsewhere,' being the fifth and sixth words herein propounded, such being done after the said testatrix had written the aforesaid names, initials and word, 'Charles Greville, M. D., Bath,' the said Charles Greville, after the same had been so written by the said testatrix, himself writing the word 'to' now appearing in a line with the names Charles Greville just under the

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seventh line of the said will. And this was and is true, public and notorious, and the party proponent alleges and propounds as before."

Miss Mechi is examined upon this article, and upon the eighth, in conjunction with it. It is by no means convenient that the examiner should, of his own authority, take upon himself so to unite the articles: we must of necessity, in order to ascertain the truth of the case, and do justice, separate the evidence, and determine how each part of it applies to each article; the strength of this observation will be very apparent when we come to scrutinize the evidence.

The sixth article applies to facts antecedent to those pleaded in the seventh, to a prior interview with the testatrix, and to instructions received from her, prior to the facts pleaded in the seventh.

We must now direct our attention to the evidence of Miss Mechi.

The sixth and seventh articles speak of two separate interviews. Miss Mechi speaks of one only, and that one, not the transaction pleaded in the sixth, but the transaction pleaded in the seventh article; and, in truth, her evidence on the sixth article applies to the seventh only. Miss Mechi does prove, that at this interview the testatrix did, as she calls it, sign the paper. Sign the paper in the usual meaning of the term she did not, but she wrote upon it, according to the evidence of Miss Mechi, and the only words she could have written are, "Charles Greville, M. D., Bath." Notwithstanding the use of the ambiguous expression "sign," we have no doubt that the testatrix did on this occasion write these words, "Charles Greville, M. D., Bath;" but here all proof ends. All the rest of this seventh article is left wholly unproved by the testimony of this witness: the state and condition of the paper, the alterations said to have been made, are all without a shadow of proof from the evidence of Miss Mechi. True it is, that an interview between Dr. Greville and the testatrix is proved, and that the deceased wrote on the paper, but nothing more. No other witness is examined upon this seventh article.

The eighth article pleads, that after the insertion of the words propounded, namely, "in the Long Annuities & elsewhere to Charles Greville, M. D., Bath," the will, after having been read over to her by Charles Greville, was duly executed by the testatrix. If this article be satisfactorily proved, the words propounded must be pronounced for. The testatrix was of sound mind; and if the will as it now stands, with her own signature after the residuary clause, was read over to her, and she executed it, then the ordinary presumption of law is, that she intended to give effect to what was therein written, and the exigencies of the statute are satisfied; but in a case like the present, considering the will to be in the state represented by Mr. Netherclift, their lordships must be satisfied by extrinsic evidence that the words in question were in the will at the time of the execution, and were known to her to be there.

Miss Mechi says, the testatrix signed the will in the presence of Mrs. Clark and her servant, and so did Mrs. Clark; but her servant being unable to write, Mrs. Pugh was sent for; the witness says, that "there were some legacies, two, I think, added to the will;" that was, while Mrs. Clark was in the room and before Mrs. Pugh came.

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According to the plea of Dr. Greville, this had been done previously as pleaded in the seventh article. Miss Mechi cannot be certain whether this was before or after the deceased signed the will. After Mrs. Pugh's arrival, the testatrix declared the paper to be her will. Mrs. Pugh signed it, and then Mrs. Clark. Miss Mechi states that the will was not read over to or by the deceased in her presence. Whether the words propounded were in the will or not, this witness gives no evidence, but she deposes to the fact of the words, "Charles Greville, M. D., Bath," being there.

The result of the evidence of Miss Mechi, is, that she proves the act of execution and no more ; she does not prove reading over, knowledge of contents, or that all the words propounded were in the will.

Mrs. Clark, one of the attesting witnesses, says, Dr. Greville "read over to the deceased, from the will, the names of the persons to whom she had given legacies in the will, and the deceased told him of two other legacies to be put into the will, (this confirms Miss Mechi) and I saw him put them into the will at the top of the second page;" she then proves the execution. Upon the thirteenth interrogatory, she is examined to a very important part of the case, the reading over and the existence at the time of the execution, of the words propounded, but she cannot swear to the reading over of the whole ; indeed she thinks that all of it certainly was not read over in her presence ; nor can she speak to the words propounded.

Mrs. Pugh proves the execution, but not the reading over, or the existence of the words in question.

Then what has been proved by the witnesses in support of the plea ?—the execution of the paper, and that it contained the words "Charles Greville, M. D., Bath;" but it is not proved by any affirmative evidence, that the words propounded were inserted prior to the execution.

What the law may be upon this state of facts we will postpone considering until we have referred to the evidence produced on the part of the executors ; we mean the evidence applying to the making of the will, and the words propounded. On this part of the case, the executors have examined Mrs. Barnes and Miss Mechi.

With respect to the evidence of Mrs. Barnes, however important it may be, with a view to other questions raised in this case, it will not be found to have any stringent bearing upon the points we have been particularly discussing, namely, the execution of the will, and the insertion of the words propounded prior to the execution.

Mrs. Barnes, after detailing many particulars as to the writing testamentary papers, and as to Dr. Greville undertaking to make the will on the 30th of January, on her declining, states, that being with Dr. Greville, in the back room, and having detailed to him the list of names and legacies in script No. 1, and read the script C, Dr. Greville said, when she came to the part, as to the division of the trinkets, "Oh! that is very indefinite, I had better go in and ask her;" that he did so, and remained with her two or three minutes, when he returned, and said the trinkets were not to be mentioned, that she would give them to her brother to be distributed to her friends, or

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dispose of them in her lifetime. This witness never saw the will at all, so as to see its contents; she was not present at the execution: so far as she knew any thing of the will, there was no residuary clause, excepting that contained in script C, which she swears she dictated to Dr. Greville, and believes he wrote it down. The first notice she had of the residue being left to Dr. Greville was from himself, some short time after the execution of the will.

It is clear that her evidence does not in any degree prove knowledge of the contents by the testatrix, or that the words propounded were inserted prior to the execution. The declaration of Dr. Greville can hardly be received as evidence to prove the fact, though it is entitled to consideration, to show that he did not wish to conceal what he had asserted had been done.

Miss Mechi has been examined on this allegation also. There is little new to be found in her evidence. In her examination on the eleventh article, she swears, that when the deceased signed her name on the will (she must mean write Dr. Greville's name, though probably the witness thought it was her own,) no conversation took place as to the trinkets; that she is sure.

There are circumstances pleaded and proved on the part of the executors, which it is proper to notice, partly, indeed, for the purpose of endeavoring to discover what were the intentions of the deceased.

It is pleaded in the seventh article of the allegation given in on the part of the executors, that on or about the 27th of January, Mrs. Barnes, by the instructions of the deceased, wrote the script marked C; that about the same time, in consequence of similar instructions, she wrote the script marked No. 1.

In the tenth article, it is pleaded, that when Mrs. Barnes was with Dr. Greville, and he was writing the will in the back room, she read to him the substance of the script C, and that he appeared to write the same down.

The facts pleaded in the eleventh article are very important: it is alleged, that in reference to that part of script C which directed the trinkets to be divided amongst her young friends, Dr. Greville said, the term young friends was indefinite, and took the will into the room where the deceased was, to consult her about it; that he returned, and brought back an answer from the deceased, that she did not wish them to be mentioned in the will; that she would dispose of them in her lifetime, or send them to her brother to give away.

Script C is produced: it does mention the trinkets, it does name the executors, and it does dispose of the residue.

We will first consider the proof of those averments and then the inferences to be drawn.

Mrs. Barnes is the witness to whom we must refer. It is true that her evidence does show a disposition not favorable to Dr. Greville, and where matter of opinion was alone concerned it must be our duty to watch such evidence with vigilance; but we see no reason to distrust her veracity when she is deposing to facts within her own knowledge. Her evidence on the seventh article is to the following effect:—that two or three days before January 30th, she wrote, from

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the dictation of the deceased, the paper marked C, word by word; that the deceased signed it at once, and took possession of it; that it referred to a list of legatees previously written: it was meant to answer instead of a will, in case she should die without making a will; it was addressed to Richard White, Esquire, the brother of the deceased, by the deceased herself. The witness then speaks as to the script No. 1. She says, she wrote it about a week before the testatrix left Notting Hill. A nought is put down in the list opposite to Dr. Greville's name, because the deceased wished the question, as to what he was to have, to be left open. In a former list of names written by Mrs. Barnes, when the testatrix was at her father's house, 100*l.* had been written down as the legacy for Dr. Greville. The deceased had the former list of names when she dictated the script No. 1: she said 100*l.* was not sufficient. Mrs. Barnes said, shall I put in 300*l.* or 500*l.*? You had better put something definite. She replied, no, that would be too much; I will leave it open. Papers C and No. 1 were to be given to her brother, Mr. White, as containing her will, if she did not make another, and the testatrix expressed her confidence that he would carry her wishes into effect.

According to the evidence of Mrs. Barnes, nothing was done to complete the will till the 30th; what passed in the intermediate time is not of much importance.

Saturday, the 30th, is the day of the execution of the will; and on the eighth article, Mrs. Barnes deposes to the transactions of that day; first, that the deceased gave her the papers C and No. 1, and desired her to make her will; that she declined, and that Dr. Greville took the papers, and walked with them into the next room to make the will. On the ninth article, Mrs. Barnes states, that the deceased desired her to follow Dr. Greville, saying, "Now mind he only writes what you dictate to him." If Mrs. Barnes be correct in all the evidence that she has given upon this article, it would certainly follow, that the testatrix had a distrust of Dr. Greville; but supposing the fact to be so, we do not think that her suspicions alone could form any just ground for imputation against Dr. Greville; and we advert to the fact, not on that account, but as an important part of Mrs. Barnes's narrative, and accounting for the conduct which she swears she pursued: she states that, according to what the testatrix had said, she followed Dr. Greville into the back room; that she took both the scripts, C and No. 1, and dictated to him the names in No. 1; that when she came to Dr. Greville's name, he said, "Oh! I wont write down my own name at all." She said, "You must; I formerly put 100*l.* for you; the deceased said it was not sufficient." He said, "I should think not; for she has never paid me for my attendance or trouble."

Mrs. Barnes's evidence on the tenth article is very important. She says, that after having dictated the names from list No. 1, she dictated the very words of paper C, in regard to the appointment of executors, and the disposition of the residue. She thought that Dr. Greville had written it all down.

On the eleventh article Mrs. Barnes states, that she read the script

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C to Dr. Greville; that when she came to the part relating to the trinkets, Dr. Greville said, it was indefinite, and went to ask the deceased, and returned with an answer that they were not to be mentioned in the will.

In setting forth the evidence of Mrs. Barnes, we have confined ourselves to that part of it which contains the statement of facts, as to making the will, abstaining from noticing any observations or descriptions to be found in the evidence, and which might be construed to reflect upon Dr. Greville. We think that Mrs. Barnes may be trusted as to the statement of facts, and looking at the imputation made against her, in the argument at the bar, of bias against Dr. Greville, we abstain from noticing any thing which would reasonably be the effect of such bias.

The facts are very important; first, they prove that the testatrix, three or four days before making the will, had no intention to give the residue to Dr. Greville, but intended a different disposition; second, that she did intend to confer upon him a legacy, but deemed 300*l.* or 500*l.* too much; third, that, on the very morning the will was executed, she gave, as instructions for making it, scripts No. 1 and C, in conformity with what has been above stated.

But Dr. Greville's case is, that there was no script C at all. He does not notice it in his pleading; he ignores its existence altogether, so far as his own knowledge extends. However this may be, we cannot doubt the fact, that the testatrix gave Mrs. Barnes script C, as part instructions for her will, and according to Dr. Greville's own statement he did not notice or adopt it. If so, it necessarily follows, that a will was prepared for the deceased not in conformity with her instructions; with instructions given on the very day of execution, signed by the testatrix herself, three or four days before, to operate as a will if she did not make another.

Upon this evidence two questions seem to us to arise:

First; has Dr. Greville proved that the words in dispute, or any part of them, were in the will at the time when the testatrix executed it?

Secondly; has he proved that those words were known and intended by the testatrix to form part of the will at that time?

Look first at the case as stated by Dr. Greville himself in his allegation. He is speaking to facts within his own knowledge; in truth, in a great degree, of his own acts, of matters in which he has the deepest interest, which took place within a twelvemonth previous to the time at which he gives in the allegation, and with respect to which, therefore, there is no excuse for any inaccuracy.

Now his statement is, that he originally wrote out the will with his own name appearing amongst those of the other pecuniary legatees; but with no sum of money or other bequest set against it, and with a residuary clause in these words:—"I give the remainder of my property to," with a blank for the names of the residuary legatee or legatees, and that he took the paper in this state to the testatrix who was in the adjoining room.

According to the paper so prepared, it would seem that Dr. Greville

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was intended to be a pecuniary legatee, and that the testatrix had not decided, or at least had not communicated to Dr. Greville, who was to be her residuary legatee.

It is very difficult to suppose that at this time Dr. Greville could imagine that his was the name to be introduced into the residuary clause; yet if such intention had not been previously declared by the testatrix, when was it expressed? It should seem, from the allegation, (article seven,) that it was only expressed at the time when the testatrix inserted Dr. Greville's name.

But Miss Mechi, the only witness to what passed at this time, most distinctly contradicts any such expression of intention. In her deposition to the seventh and eighth articles, she states, as to Dr. Greville at this interview: "He did not sit down, he merely put the paper before the deceased, and put the pen in her hand, and asked her to sign the paper, and she did so accordingly, and then Dr. Greville walked out of the room again directly; that was all that passed." She then says, that he pointed out the place where the testatrix was to sign, repeating the words, "Just here," more than once. In her answer to the eighth interrogatory, she gives the same account of the transaction, and adds, that the testatrix "immediately signed something in the place pointed out, without making any observation, and immediately that she had done so, Dr. Greville left the parlor and returned into the little back room, where Miss Fawkener was, taking the said will with him."

It is clear, therefore, that no intention of making Dr. Greville residuary legatee was expressed at this time. The silence of Dr. Greville, as to any previous communication of such intention of the nature of the paper which he prepared, shows that none such had been previously expressed to him.

But if such intention existed at the time, the mode of carrying it into effect was perfectly obvious. Nothing was necessary to be done but to add the name of Dr. Greville, after the words already written, "I give the remainder of my property to;" and Dr. Greville, according to the evidence of Miss Mechi, was very particular in pointing out the exact spot where his name was to be written, and would naturally have taken care that it followed immediately after the word "to," and without any interval.

Instead, however, of this simple and obvious course being pursued, we find the name of Dr. Greville written at a considerable distance from the termination of the residuary clause, as it originally stood, and two alterations made in that clause. These alterations are proved to have been written with a different pen and different ink from each other, and one of them upon an erasure. The presumption, therefore, is, that they were made at different times.

Now, these two alterations are most important. We will consider them in their order, and the inferences which result from the paper itself, coupled with the evidence, and afterwards consider Dr. Greville's explanation. First, the word "to" following the words "remainder of my property," is struck out, and the words, "in the Long Annuities," are added, so that the gift is cut down from a gift of the

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whole residue, to a gift of the long annuities which the testatrix might possess. When this was done, does not appear; the period of introducing these words was not that at which Dr. Greville's name was inserted, according to the evidence of Miss Mechi; nor does Dr. Greville even suggest any intention to make such limited bequest to him.

Yet thus the will certainly stood for some period, how long does not appear; and as to its restrictive operation, nobody could entertain a doubt. Supposing the paper in its present state to be the genuine will of the deceased, she again altered her intentions in the short interval which elapsed between the insertion of the words last referred to and the execution of the instrument; and having previously determined not to give the general residue to Dr. Greville, was now determined to give it to him, and to restore the clause to its original effect: and for this purpose she caused the word "to" following the words, "Long Annuities," not to be struck through with a pen, as the former word "to" had been, but to be carefully erased with a knife, and the words "& elsewhere to" to be added. Now, when could this have been done? Not on the occasion when the words "in the Long Annuities" were introduced; not at the time when Miss Mechi speaks to the introduction of Dr. Greville's name; not at the time of the execution of this will, for nothing of the kind is alleged by Dr. Greville to have then taken place, and the witnesses present at the time, who speak to the insertion at that period of two additional legacies to other persons, say nothing of this.

Now, what is Dr. Greville's account of this extraordinary state of things? He says, that the testatrix intended to give him the residue, but desired that his name should remain in the list of pecuniary legatees; that he altered the bequest, from a bequest of the remainder of her property in the long annuities, at her suggestion, in consequence of her remarking that she had property in the long annuities.

Now, is it to be believed that any person of common sense, however inattentive to, or regardless of, his own interest, could have done this? — the effect of the alteration could not have escaped him: but he gives himself a part instead of the whole of the property, not because the testatrix intended that he should take only a part, but because she mentioned the long annuities, as belonging to her. He then says, that at the same interview, after his name had been inserted by the testatrix, he introduced the words, "& elsewhere to," in consequence of her suggesting that she had other property besides the long annuities: this latter alteration being made, according to Dr. Greville's allegation, after the two additional legacies found in the will had been inserted.

Now, we must say that this account appears to us quite incredible; and it is contradicted both by the appearance of the paper, the evidence of Miss Mechi, and the evidence of the persons present, when the two additional legacies referred to were introduced; and it is utterly unsupported by any evidence whatever.

Is it possible, in this state of things, to say that probate should have been granted to the residuary clause as it stands?

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But it is then said, at all events the deceased intended to give Dr. Greville the long annuities : those words were inserted before the execution of this instrument, and the court cannot withhold from Dr. Greville that part of which he has proved the bequest, because he has failed in proof of the remainder, nor can it refuse to give effect to the genuine portion of the clause, even if it should hold that an addition had been fraudulently made to it by Dr. Greville.

We agree to these as general propositions, but Dr. Greville's case must be judged according to his own allegation of the facts, which are all within his own knowledge, and the evidence by which he has supported it. He has called his opponents to meet a case, not of specific bequest, but of general residue ; he never set up any case of an intention to give a part as distinct from the residue. The whole clause, according to his statement, was inserted at the same interview and for the same purpose, and we have already stated our clear opinion, that this case is not only not proved, but is clearly disproved, by the evidence.

But if he had alleged an intention to give the long annuities, and a subsequent intention to enlarge the gift by extending it to the residue, in such a state of the record what evidence should we have had *dehors* of the will, that the testatrix knew that the instrument contained any such bequest of the long annuities ? Proof which, for the reasons already assigned, we hold to be, in this case, necessary.

We are aware, of course, if it was the intention of the testatrix to give him the long annuities, the natural mode of doing it would have been for her to write those words opposite to Dr. Greville's name, in the blank left in the list of legatees, and to fill up with some other name the blank in the residuary clause. It would be a singular way of making a gift of the long annuities, for the testatrix to give the remainder of her property in them, having previously made no bequest out of them, and at the same time to leave her general residue undisposed of ; her attention at the time being called to the residue.

How, then, are we to be satisfied by any extrinsic evidence, that the will, at the time of its execution, was, with the knowledge of the testatrix, in the state in which, according to this hypothesis it must have been, when there is no evidence of it, nor as we think much probability in its favor, and against the positive allegation of Dr. Greville, the facts being within his own knowledge ?

It is quite true, that the insertion of Dr. Greville's name in the will shows that the testatrix meant to give him something ; but how does it prove that she meant to give him the long annuities, or the remainder of the long annuities, which means a part after something has been taken away, unless the subject of the gift had been shown to have been in the will when the name was inserted ?

If we were to allow ourselves to conjecture what the testatrix intended, we might think it not improbable that her intentions were that which Miss Mechi says she had often expressed, viz., that the long annuities, which were her savings, should go amongst her friends,

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as distinguished from her relations, and it is possible that she may have meant, that after payment of her pecuniary legacies, perhaps of debts and funeral charges, the remainder of her long annuities should be given to Dr. Greville, but this is mere conjecture.

All that appears to us to be clear upon legal evidence, is, that the testatrix intended Dr. Greville to be an object of her bounty, and inserted his name for that purpose, but that the will did not contain at the time of its execution the bequest in favor of Dr. Greville, for which he contends, and that there is no evidence to satisfy us of what it did contain.

The result is, that the judgment complained of must be affirmed, with costs.

There can be little doubt that Dr. Greville has failed to derive from the testatrix's will benefits which, of some kind, and of some amount, she really intended him to take. But he has nobody but himself to blame. If a physician, after a long attendance on a patient, thinks fit, when she is almost upon her death-bed, to prepare and procure the execution of a will, by which he becomes the principal object of her bounty, to the exclusion of her near relations, and to do this without the intervention of any solicitor, or other person competent to give her advice, and to guard her against undue influence, the interests of the public require that his conduct should be regarded by courts of justice with the utmost jealousy: in circumstances such as here appear, clear evidence should be required both as to the bequest in his favor being continued in the will at the time of its execution, and as to the testatrix's knowledge that it was so.

JOHN STEVENSON MOORE, *appellant*, and JOHN CLUCAS, *respondent*.¹

December 17, 1850, and February 17, 1851.¹

Action for Deceit — Pleading — Practice.

Although there is not so much strictness required in pleadings in the courts in the Isle of Man as in England, yet where a declaration in an action for deceit contains specific averments of fraud, such averments must be established by proof, to entitle the plaintiff to recover.

When the question is one of fact only, and has been tried by a jury in the court below, this court will not reverse a judgment upon such finding, unless they are satisfied that the judgment is clearly wrong.

THIS was an action brought by the respondent against the appellant, in the common-law court for the southern district of the Isle

¹ 7 Moore's Privy Council Cases, 352. On Appeal from the House of Keys in the Isle of Man. Present, Lord LANGDALE, Mr. BARON PARKE, the Right Honorable Dr. LUSHINGTON, the Right Honorable T. PEMBERTON LEIGH, and the Right Honorable Sir EDWARD RYAN.

of Man, to recover damages for the loss he had sustained by the appellant's deceit, in selling him cattle affected with a fatal and contagious disease, as sound and in good health.

The declaration stated, that previous to and in the month of August, 1847, the defendant was possessed of certain cattle, which cattle were, previous to and in the month of August, infected with a contagious and fatal disease. That the defendant, knowing the cattle to be infected with such disease, and with a view to deceive and impose upon the plaintiff and other persons, did, in the month of August, 1847, publicly advertise and give notice of his intention to sell the cattle by public auction on the 24th of the month of August, 1847, and did cause it to be believed by the plaintiff and the public in general that such cattle to be sold as aforesaid were sound and in good health. That the plaintiff attended the auction on the 24th of August, 1847, and the defendant did then and there falsely and deceitfully induce the plaintiff and others who attended such auction, to believe that the cattle so to be sold by the defendant were sound and in good health, he the defendant well knowing that such cattle had been, and still were, laboring under and affected with a contagious and fatal disease, and that the plaintiff did, in consequence of such the inducement of the defendant, then and there buy from the defendant three head of cattle, consisting of a bull, a cow, and a heifer; the plaintiff, by such the false and deceitful inducement of the defendant as aforesaid, believing such bull, cow, and heifer to be sound and in good health, whereas, in truth and in fact, the bull and cow were then affected with a contagious and fatal disease, of which the defendant was well aware, and in consequence thereof the contagious disease was communicated by the bull and cow to the other cattle of the plaintiff, and such disease had spread amongst such cattle to a great extent, and divers of such cattle of the value of 15*l.* each, and eight heifers of the value of 5*l.* each, had of such contagious disease died, and divers of such cattle had been laboring under such disease, and that the plaintiff had been put to great expense in effecting their cure; that they were so reduced as to be unfit for sale, and that the plaintiff's cattle generally had become unsalable. By means of all which the illegal actings and doings of the defendant, the plaintiff charged that he was damaged in the sum of 300*l.* sterling, for recovery whereof the plaintiff brought suit and prayed judgment according to the due course of the common law.

The defendant pleaded and put in issue the allegations contained in the declaration, upon which issue was joined, and upon the petition of the plaintiff a special jury was ordered to try the issue.

The action was tried by a special jury on the 4th of July, 1848, at a common-law court holden at Castle Rushen.

It appeared from the evidence, that the appellant kept a large stock of cattle on his farm, at Lhergydhoo, in the Isle of Man. That in April or May, 1847, some of the cattle on this farm became affected with a disease which then prevailed among the cattle on the island, and some of the cattle died. Where the disease appeared, it attacked the throat, lungs, heart, and liver, was often fatal, and was frequently

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communicated from one animal to another. That on the 11th of August, 1847, the appellant caused an advertisement to be inserted in the *Mona's Herald* newspaper, announcing a sale by auction. The stock to be sold was described in the advertisement, as follows: "The stock consists of 6 capital farm horses; 10 excellent milch cows; 1 superior three-year old short-horned bull, got by a son of Gainsford, bred at Carlisle, and imported to this island last October; 1 two-year old bull, grandson of Betterall; 1 one-year old short-horned bull; 21 heifers and bullocks, from 1 to 3 years old; 7 calves; 6 sheep; 26 lambs; 1 two-year old filly; 2 two-year old colts." The respondent attended the auction, and purchased a bull, a cow, and a heifer, which he caused to be removed to his estate at Ballakilly. The appellant was present at the sale. The conditions of sale were declared at the commencement of the auction. There was a great deal of conflicting evidence as to what took place at the sale. The auctioneer, who was a witness for the appellant, stated in his evidence that, at the commencement of the sale, immediately after the conditions were read, the appellant went to the auctioneer and said that the cows had had the disease, but he considered they had then recovered from it, and that the young cattle had never had it, and that he repeated openly and loudly, as the statement of the appellant, that the milching cattle had had the disease, but were now clear of it, but the young cattle had never had it. Two other witnesses for the appellant deposed that he himself addressed the statement openly and loudly to the persons assembled, but at a later period of the auction, and just before the sale of the cows. Another witness for the appellant deposed, that the appellant at the commencement of the auction, stated to the persons assembled that there had been a disease among the cows, that he had lost some, that he hoped they were now in a way of getting clear of it, but that the young cattle were free from disease; whereupon the auctioneer asked the persons present if they heard this statement, and he himself repeated it. Two witnesses for the respondent, who had been present at the commencement of the sale, and heard the conditions read, swore that nothing at all was said about the disease; both these witnesses were purchasers at the sale of the cows. A third witness for the respondent swore, that he also was present at the commencement of the auction, and heard nothing said about disease; and believed that, if any thing of the kind had been said by the appellant, or by the auctioneer, unless in a very low tone, he must have heard it. A fourth witness for the respondent stated that he was present at the commencement of the auction, was within five yards of the auctioneer, and was attentive to him when the conditions were declared, and that he heard nothing stated respecting disease. This witness was also present during the whole of the sale. Another witness for the respondent, who was present at the commencement of the sale, and, as he believed, heard the conditions read, did not hear any thing about the cattle having been diseased. And a witness for the appellant, who also was present when the sale commenced, and purchased cattle there, could not swear that any thing was said about disease in the cattle. There was no evidence that the cattle were diseased at the

time of the sale ; or of the defendant's knowledge of such disease. Two days after the respondent had taken home his purchased cattle, the cow became unwell, and continued very ill for some weeks ; she recovered and was turned out of the cow-house into a field, and another cow put into the place in the cow-house which she had occupied. This cow immediately became ill, and afterwards the cow in an adjoining stall, and gradually a sickness, which appeared to be the same in all the cases, spread amongst the respondent's other cattle ; twenty-two took the disease, some were severely affected, others more slightly ; all these recovered. Ten more cattle, namely, two cows and eight heifers, took the disease and died of it, one of the cows being in calf, and the other having then lately calved. Of the twenty-two that recovered, four were in calf and lost their calves, twelve were milch cows, and two were fat cattle ; the milch cows lost their milk, and the fat cattle were reduced. The symptoms in all the sick cattle were alike and similar in all material respects to those which appeared in the cattle at Lhergydhoo. There was no disease among the respondent's cattle when the cattle purchased at the sale came to his premises. Four days after the auction, the respondent lent the bull to a neighbor, named Clugstone, and his cattle, which until that time had been healthy, soon afterwards became affected with a sickness, like that under which the cattle at Ballakilley were laboring, and four of them died. Another neighbor sent a cow to the bull when at Clugstone's, and shortly afterwards this cow, with others of his cattle, became ill of a like disease, and two died. The cattle on this witness's premises had had no disease before the cow returned from Clugstone's.

Upon this evidence the jury found for the defendant, and dismissed the action, each party paying his own costs.

The plaintiff appealed from this verdict to the House of Keys.

The House of Keys, on the 20th of April, 1849, after reading the depositions of the witnesses, gave judgment, and thereby ordered and adjudged the verdict to be reversed, and that the plaintiff should recover from the defendant the sum of 110*l.*, with the costs incurred in the court below.

Against this judgment the defendant appealed to Her Majesty in Council, submitting that such judgment was erroneous, and ought to be reversed for the following reasons :—

1st. That the House of Keys had no power to reverse the verdict, and give damages to the plaintiff, then appellant.

2d. That even if they had such power, the House of Keys ought not, upon the evidence given in the cause, to have reversed the verdict and given such judgment for the then appellant.

3d. That the jury who tried the cause in the common-law court, and heard the witnesses examined, were more competent to form an opinion upon the evidence than the House of Keys, who merely read the depositions of the witnesses. That even if the House of Keys had the power to reverse the verdict and assess the damages, they ought not to have done so, unless it was quite clear that the jury had come to an erroneous conclusion upon the evidence. Whereas so

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far from its appearing that the jury came to an erroneous conclusion, their verdict was fully warranted by the evidence.

On behalf of the respondent it was contended that the judgment appealed from ought to be affirmed for the following reasons:—

1st. Because the respondent was justly entitled to the damages awarded in respect of the loss he had sustained by the sickness and death of very many of his cattle, which sickness was communicated to them by the cattle sold to the respondent at the appellant's auction; the appellant having, at the auction, fraudulently deceived the respondent and others, who there became purchasers, as to the true condition of his cattle.

2d. Because the judgment of the House of Keys was supported by the evidence, whereas the verdict of the jury in the common-law court was contrary to the evidence.

Peacock, Q. C., and Eade, for the appellant.

It is manifest that this judgment cannot be supported. It is an action for deceit, and the declaration alleges, as the foundation for such action, fraud. Now, the fraud alleged in the declaration is, that the defendant knowing the cattle to be affected with disease, did falsely and deceitfully induce the plaintiff to buy the bull, cow, and heifer, whereas the bull and cow were then affected with a contagious and fatal disease. The plaintiff entirely failed to prove this allegation. There was no evidence given at the trial that the bull and cow had a contagious and fatal disease, nor was there evidence that before and at the time of the sale the defendant knew that the bull and cow had a fatal and contagious disease. The charge of fraud, therefore, entirely falls to the ground. All that the evidence establishes, is, the cow had some disease, but there is no proof that she had the disease at the time of sale, or that she communicated it to the cattle of the plaintiff. There is then no proof to establish such averment, and the verdict of the special jury of the common-law court was right in finding upon such evidence for the defendant. The House of Keys improperly interfered with the privilege of the jury in weighing the credit of the witnesses. The jury had the best means of judging the value of such testimony. A court of appeal would not have reversed such a verdict upon a question of fact. *Baboo Ulruck Sing v Beny Persad*, 2 Knapp's P. C. 265.— [The court stopped the counsel for the appellant, and called upon the respondent's counsel to support the judgment appealed from.]

Adolphus for the respondent.

Pleadings in the Isle of Man are not to be construed with the strictness of English pleadings. *Johnson*, Jurisprudence of the Isle of Man, p. 67; a writer of authority on the Manx law, says, "The nicety and exactness of special pleading, which is so essential in England, is here disregarded: the forms of the court require the declaration to be merely a plain simple statement of the plaintiff's case, and either party may offer such testimony as the court may deem relevant to the matter in question." It is a foreign court, 4

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Inst. 284; and pleading being a matter of procedure, this court will recognize their practice. That disposes of the appellant's objection. There ought not to be too much strictness in requiring proof of the actual averments. It is sufficient if the substance of the declaration be proved. Now the evidence shows that the cattle had the disease at the time of the sale, and that the defendant knew of the existence of such disease.

[PARKE, B. What evidence is there of a fraudulent concealment by the defendant of the fact that the cattle were diseased, or to show that he had knowledge of such disease?]

The evidence of the auctioneer proves that there was at the sale a fraudulent concealment by the appellant, of the true state of his cattle, and that the respondent and other persons, who made purchases at the sale, were thereby deceived. The representations made when the conditions of sale were declared, were untrue, and rendered him liable. *Taylor v. Ashton*, 11 Mee. & Wel. 401, is in point. That was an action on the case for deceit, and the court held that if a party makes an untrue representation to another for a fraudulent purpose, with the intent to induce the latter to do an act which he afterwards does to his prejudice, it is not necessary to show that the defendant knew the representation to be untrue. The evidence establishes that the plaintiff's cattle were not diseased at the time of the sale, and that the cow communicated the disease to the plaintiff's cattle.

[PARKE, B. According to the declaration, you must show that the appellant knew of the existence of the disease there alleged, not of some disease; and to establish fraud, you must show that he knew of the disease being in his cattle at the time of the sale. There is some evidence of the cow being ill, and of the bull, but no evidence of their being diseased at the time of the sale.]

They do not require such strict proof in the courts of the Isle of Man, as in England.

[LORD LANGDALE. A plaintiff cannot allege one description of fraud, and prove another of a totally different kind, as you attempt to do, by making out a case of misrepresentation.]

The case of *Baboo Ulruck Sing v. Beny Persad*, 2 Knapp's P. C. Cases, 265, relied upon by the appellant, is a strong authority in our favor, as it shows that this court will not reverse a finding of the court below upon a pure question of fact.

[PARKE, B. The appellant must show that the judgment is wrong. We never reverse unless we are satisfied that the judgment is clearly wrong. *Khoorshed-jee Manik-jee v. Mehrwan-jee Khoorshed-jee*, 1 Moore's Ind. Ap. Cases, 442.]

The objections now urged to the form of the declaration and the insufficiency of the proofs, were never taken in the courts below, and therefore cannot now be entertained. *Frankland v. M'Gusty*, 1 Knapp's P. C. Cases, 274.

PARKE, B. Their lordships are of opinion that the judgment of the House of Keys ought to be reversed, and the decision of the

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common-law court dismissing the action, affirmed. The declaration contains averments of fraud; it alleges that the defendant, being possessed of certain cattle, which were infected with a contagious and fatal disease, after advertising to that effect, caused them to be sold by public auction, and did then and there falsely and deceitfully induce the plaintiff and others who attended such auction, to believe that the cattle so to be sold by the defendant, were sound and in good health, he (the defendant) well knowing that such cattle had been and still were laboring under and affected with a contagious and fatal disease; it then goes on to say that he bought three heads of cattle, consisting of a bull, a cow, and heifer, believing such bull, cow, and heifer to be sound and in good health, whereas they were affected with a contagious and fatal disease, of which the defendant was well aware, and in consequence thereof the contagious disease was communicated by the bull and cow to the other cattle of the plaintiff. None of these allegations are proved to be true, excepting the averment, that the defendant advertised such sale by auction, and it may be conceded that such advertisement contains *prima facie* evidence that the cattle were sound. But there is no proof that the cattle were affected with a contagious and fatal disease at the time of the sale, or that he knew that they were laboring under a contagious and fatal disease. In fact, there was no satisfactory proof that the cow ever had the disease, still less that the disease was communicated by her to the plaintiff's cattle. Then as to the bull, there is no satisfactory proof of its having any disease at all. It is urged, that we ought not to be too strict in requiring proof of actual averments, if the substance of the declaration was proved, as the practice of the courts in the Island is less strict upon the pleadings than in this country; that argument might be entitled to some weight, if the averments were proved. But is there any fraud proved against the defendant? It is alleged that he knew of a contagious and fatal disease in the cattle sold, which he concealed from the plaintiff; but there is no proof that he knew of any contagious and fatal disease. Again it is urged, that although the defendant did not know that the particular cattle were diseased at the time of the sale, yet the disease might have been communicated by the cattle sold, but there is no proof to satisfy us that the cow or bull was diseased. Even if the material allegations were proved, it was entirely a question for the jury, who, we are of opinion, are better able to judge of the conduct of the witnesses, and the weight to be attached to their evidence. Upon the whole, we are of opinion that the House of Keys was wrong, and that the judgment must be reversed.

CASES.

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER,

DURING THE YEAR 1854.

COTCH v. STEEL.¹

November 15, 1853; January 18, 1854.

Ship and Shipping — Unseaworthiness — Right of Seaman to maintain Action for — Supply of Medicines — Action, Right of — Breach of Public Duty — Special and Private Injury.

There is no implied obligation on the part of the owner of a ship towards a seaman who had agreed to serve on board of her, that the ship shall be in a fit state to perform the voyage; and in the absence of any express warranty to that effect, or any knowledge of the defect, or any personal blame on the part of the ship-owner, the seaman cannot maintain an action by reason of the ship becoming leaky, and of his being obliged to undergo extra labor.

The 7 & 8 Vict. c. 112, s. 18, requires that every ship navigating between the United Kingdom and any place out of the same, shall keep constantly on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages, and in case any default be made in keeping such medicines, the owner of a ship is made liable to a penalty, which by section 62 is recoverable at the suit of any person, and is to be applied in part to the informer, and the residue to the Seamen's Hospital Society: —

Held, that the penalty was recoverable for a breach of the public duty, created by the statute, and that the provisions of the statute did not interfere with the common-law right of a seaman serving on board the vessel to maintain an action in respect of a special damage resulting to him from the breach of the duty.

THE declaration stated, that the defendant, being a subject of Her Majesty Queen Victoria, was the owner of a certain British registered

¹ 23 Law J. Rep. (N. S.) Q. B. 121; 18 Jur. 515.

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bark or vessel called and known as the Persian, which at the time of the making of the agreement hereinafter mentioned was in port, within this realm, to wit, in the port of Plymouth, and the plaintiff, then being a subject of Her said Majesty Queen Victoria, was then an able-bodied seaman in good health, duly registered, and had before then provided himself with and then had a registered ticket, according to the form of the statute in such case made and provided. And thereupon the plaintiff, in his own behalf, and the defendant, by one John Davies, the master of the said bark or vessel of the defendant and the agent of the defendant in that behalf, made and entered into an agreement in writing in the form, and containing all the matters and things, and made, entered into, signed, dated and attested in all things as required in and by the statute in that case made and provided, whereby it was agreed by and between the plaintiff and the defendant (amongst other things,) that the defendant engaged the plaintiff to serve, and the plaintiff promised to serve as a seaman in and on board the said bark or vessel from a certain place, to wit, Plymouth, to a certain other place, to wit, Aden, and from the last-mentioned place to a certain other place, to wit, Calcutta, and from the last-mentioned place to a certain other place, to wit, England, for wages and reward to be paid by the defendant to the plaintiff in that behalf, and after the rate of 2*l.* 2*s.* 6*d.* by the month, and for each and every month during the whole continuance of the said voyage, and until and up to the arrival in England of the said bark or vessel as last aforesaid. And the plaintiff avers that he, the plaintiff, then being such able-bodied seaman and in good health as aforesaid, did ship himself on board, and serve and go as a seaman in the said bark or vessel of the defendant on the voyage aforesaid, and according to the terms of the agreement aforesaid, and continued so to serve, and was always ready and willing to continue as to serve, and performed and fulfilled the said agreement in all things on his part to be performed and fulfilled, until he was prevented by sickness caused and procured by the defendant as hereinafter mentioned. Yet the defendant so carelessly and negligently managed, fitted out and equipped the said bark or vessel, that by reason thereof, and of the defendant's neglect and default in respect of the said bark or vessel, the said bark or vessel at the time of her sailing from Plymouth aforesaid and commencing the said voyage was wholly unseaworthy, and in a leaky and dangerous condition, unfit to be sent or go to sea; and by reason thereof, the plaintiff was, during the voyage aforesaid from Plymouth aforesaid to Aden aforesaid, and from Aden aforesaid to Calcutta aforesaid, unable to sleep in his hammock, and was continually wet; and thereby and by reason of the excessive and unreasonable labor which the plaintiff was then and during all the voyage aforesaid compelled, in consequence of the unseaworthy, leaky and dangerous condition of the said bark or vessel, to undergo, the plaintiff during the said voyage, and whilst on board of the said bark or vessel, became and was and continued for a long time sick, lamed and disabled and greatly injured in his health, and was thereby put to and suffered great bodily pain.

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Second count, that whilst the defendant was such owner of the said bark or vessel as aforesaid, and before and at the commencement and during all the continuance of the said voyage and after the making of the said agreement, and whilst the plaintiff served on board of the said bark or vessel as such seaman as aforesaid, and under the said agreement, the defendant neglected to provide or keep, and made default in providing and keeping on board the said bark or vessel a sufficient and proper supply of medicines and medicaments suitable to accidents and diseases arising in sea voyages, whereby and by reason of such last-mentioned neglect, the plaintiff was unable to be cured of his said sickness on board of the said bark or vessel, and suffered great pain and anguish of body and mind.

Demurrer and joinder in demurrer.

Kingdon, in support of the demurrer, Nov. 15, 1853. — The first count discloses no cause of action. The contract, as there stated, relates to a specific vessel in which the plaintiff agreed to serve, and no such warranty of seaworthiness as the declaration supposes can be implied from the relation of the parties. Such an action is against all principle, and if it were supported it would lead to a vexatious multiplication of suits, since every seaman who engaged on board a vessel which turned out to be leaky might bring his separate action against the owner. *Seymour v. Maddox*, 16 Q. B. Rep. 326; s. c. 5 Eng. Rep. 265; is very much in point. There it was held, that there was no implied duty on the part of a manager of a theatre to fence round or light a hole in the stage, through which one of the performers fell, in the absence of any express contract to that effect. The plaintiff there, as here, chose to serve, and he was bound to take the risk of any consequences which might occur from the existing state of things.

[LORD CAMPBELL, C. J. He may have been perfectly aware of the state of the vessel, but have agreed to sail in her for higher wages.]

Priestley v. Fowler, 3 Mee. & W. 1, proceeded on the same principle. There it was held, that no duty arose from the mere relation of master and servant, which rendered the former liable for damage occurring to the servant from the breaking down of an overloaded van; as the servant might have declined the risk if he chose, and not having done so, he was bound to take the consequences — *Hutchinson v. The York, Newcastle and Berwick Railway Company*, 5 Exch. Rep. 343; and *Wigmore v. Jay*, Ibid. 354. Then as to the second count. The 7 & 8 Vict. c. 112, s. 18, provides that every ship navigating between the United Kingdom and any place out of the same shall keep on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages, according to a scale to be issued by the admiralty, and in case of default the owner is to be liable to a penalty of 20*l*. By section 62 all penalties imposed by the act for which no specific mode of recovery is provided are to be recovered either in the superior courts at the suit of the attorney-general or by summary proceeding before justices of the peace; and a portion, not exceeding one half, of the penalty is to be paid to the informer,

and the residue to the Seamen's Hospital Society. The ordinary rule, therefore, applies, that there being a new duty created by a statute with a specific remedy for its violation, that remedy must be exclusively pursued, and an action cannot be maintained.

Milward, contra. As to the first count. In *Gibson v. Small*, ante, p. 16, in the House of Lords, Parke, B., intimated an opinion that there is an implied warranty of seaworthiness in all contracts relating to sea voyages. But it is not necessary to contend for a warranty here; it is sufficient if defendant has committed a tort or the plaintiff has sustained some specific damage arising from the unseaworthiness.

[WIGHTMAN, J. The ship does not appear to have been unable to perform the voyage; the plaintiff's complaint is only that he was obliged to do extra work.]

The ship was unseaworthy in the sense of not being in every way fitted for the voyage. In Maude and Pollock on Merchant Shipping, p. 87, n. b, it is said, "By the American law, a curious right is given to the mate and majority of the crew to stop the ship after the voyage has begun but before the land is left, if they deem her unsafe or not duly provided, and to cause her to be examined and repaired, if necessary, at the nearest or most convenient port," referring to 3 Kent. Com. 177. All the cases cited on the other side arose between one servant and another. It is said that the plaintiff might have been aware of this defect, but if the position of a mariner in regard to a ship in which he is about to engage is considered, that argument can hardly be sustained. The Merchant Seamen's Acts seem to impose such a duty, as they are pointed to the protection of a peculiarly helpless and improvident class of persons. Then as to the second count. The duty of providing proper medicines is imposed by the 7 & 8 Vict. c. 112, and the penalty imposed by section 18 is not meant to oust the right of a party injured by a breach of that duty from suing in respect of it. Section 57 shows that there is another mode of proceeding besides that by way of penalty in case of insufficient medicine being on board, and, therefore, that cannot be the exclusive remedy. The 13 & 14 Vict. c. 93, s. 64, imposes the duty of issuing a scale of medicines, &c. on the Board of Trade instead of on the Admiralty; and by section 66 inspectors are appointed who are to certify whether a proper supply is on board, and if a ship proceeds to sea without such a certificate, the owner is liable to a penalty.

Kingdon, in reply. [The Court desired to hear him only as to the second count.] The 13 & 14 Vict. c. 93, does not at all alter the duty created by the former act.

[COLERIDGE, J. Is the remedy provided by the 7 & 8 Vict. c. 112, s. 18, one intended to recompense the individual? Is not its object to punish for the breach of a public duty?]

Possibly that may be the object of the enactment, but as the party injured may, and in most cases will be the informer, he will be

recompensed by a share of the penalty. Still, in principle, this will not affect the question whether the action is maintainable or not.

LORD CAMPBELL, C. J. As to the first count, I think it is insufficient. It merely states that the defendant was the owner of a certain ship, and that the plaintiff, being an able-bodied seaman, had agreed to serve on board the said ship for a voyage from Plymouth to Aden and Calcutta and home again, and alleges that the defendant so negligently fitted out and equipped the said vessel that by reason thereof she was unseaworthy, and the plaintiff was thereby obliged to undergo unreasonable labor and was injured in his health. Now, it seems to me that there is no contract or duty disclosed in this count for a breach of which the defendant is liable. For all that appears, the defendant was quite ignorant of there being any defects in the ship, and the plaintiff himself may have examined her and been aware of her condition. If both parties had been aware of the unseaworthiness it might still have been the intention of the plaintiff to serve in her, and that in consideration of his having to work harder he should receive higher wages. If that were so, there being no *scienter* alleged and no personal blame imputed to the defendant, if this action could be maintained the owner of a ship would be liable to an action at the suit of every sailor if a plank started from accident or neglect, so that the ship was not seaworthy, there being no personal neglect of the owner whatever. No such action has ever been brought, and such a declaration is quite of the first impression. Nor is there any decision, authority, or principle which has been cited in support of such a doctrine. The defendant's counsel very properly referred to what was said by my Brother Parke, in *Gibson v. Small*, but that does not mean that in all cases there is an absolute contract with the mariners that a ship shall be seaworthy. There are several authorities the other way — *Seymour v. Maddox*, *Priestley v. Fowler*; and whether the employment is to build a house or navigate a ship, the principle must be just the same.

COLERIDGE, J. I think it is unnecessary to say what would be the case if there were fraud or concealment on the part of the owner of the ship, so as to prevent a sailor having a full knowledge of all defects existing in the ship before he sailed in her. This was a contract for a specific voyage in a specific ship, and the injury stated to have occurred is one which might clearly happen if the ship was quite fit for the voyage, though she might not be in the language of a policy of insurance, seaworthy. The plaintiff must say that in all voyages and under all circumstances there is an implied warranty of seaworthiness, as between the owner and a sailor. It is almost sufficient to answer this by saying that a claim has never before been started; for I cannot help thinking that there would have been many cases where such a claim might have been made, if it had been thought to be well founded. All that is relied upon in the way of authority for such a position is the dictum in *Gibson v. Small*; but to make that applicable you must transfer into a contract between a

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master and a sailor all the incidents applicable to a contract of insurance, which rest upon the law merchant, and have no reference to such a contract as this. A policy of insurance is a contract *uberrima fidei*, and the amount of information necessary to be given in reference to it far exceeds that which is required in ordinary contracts. Lord Campbell has shown that there are one or two authorities bearing on the other side of the question which furnish a close analogy, and lay down the principle that a servant must take care to see that there is no unusual risk connected with the service before he enters upon it; but when he has entered upon the service he must take the risk.

WIGHTMAN, J. The first count does not allege that the defendant knew the state in which the ship was. It is therefore necessary to make out that there is an implied warranty of seaworthiness between master and sailor; and for such a proposition no authority has been cited. This is an action of the first impression, and seems to be founded on some dictum in *Gibson v. Small*, in the House of Lords. But the expressions relied on were unnecessary to the decision of that case; and are a mere *obiter dictum*. There is no instance to be found of such an action, and if such a warranty existed they must have been frequently brought. The decisions referred to by the defendant lay down the principle which governs this case.

Judgment for the defendant on the first count.

As to the second count—

Cur. adv. vult.

Judgment upon the second count was now (Jan. 18) delivered by—

LORD CAMPBELL, C. J. The declaration in this case contained two counts, to each of which the defendant demurred. In the first count the plaintiff alleged that the defendant was owner of a vessel called the *Persian*, and that the plaintiff agreed with the defendant to serve, and that he did serve as a seaman on board the vessel on a voyage from England to Aden and Calcutta; and that the defendant so negligently fitted out and equipped the vessel that by reason of such neglect she was unseaworthy, whereby the plaintiff became sick and injured in his health. In the second count, the plaintiff alleged that before and at the commencement and during the continuance of the voyage, the defendant, being the owner of the ship, neglected to provide a proper and sufficient supply of medicines suitable to diseases arising in sea voyages, and that by reason of such neglect the plaintiff was unable to be cured of his said sickness and suffered great pain. At the close of the argument we expressed our opinion with respect to the first count to be in favor of the defendant, but we reserved our judgment as to the second, as we wished to look more particularly at the acts of parliament and such authorities as might be found to bear upon the question raised by that count. There is

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no allegation in terms in the second count of any duty on the part of the defendant to supply medicines for the use of the ship's company; but the plaintiff relied upon the obligation cast upon the defendant by the 18th section of the 7 & 8 Vict. c. 112, by which it is enacted, "That every ship navigating between the United Kingdom and any place out of the same, shall have and keep constantly on board a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages, in accordance with the scale which shall be issued by the Admiralty and published in the London Gazette, and in case any default shall be made in providing and keeping such medicines, the owner of the ship shall incur a penalty of 20*l.* for each and every default;" and by section 62, it is enacted, that the penalty may be recovered at the suit of any person, and when recovered shall be applied, in part, to the informer, and the residue to the Seamen's Hospital Society. By the 13 & 14 Vict. c. 93, s. 64, the duty of issuing a scale of medicines is transferred from the Admiralty to the Board of Trade; and by section 66, the Board of Trade and local Marine Board may appoint proper medicine inspectors to inspect the medicines required to be on board.

Were it not for the penalty to which the owner of a ship is subjected for not providing and keeping on board a supply of medicines, it seems clear that the action would be maintainable. The enactment provides a benefit for seamen, and according to the plaintiff's allegations in the second count the defendant has violated this enactment, and thereby the plaintiff, being a seaman on board, was deprived of that benefit and his health was impaired. The general rule is, that "whenever a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages"—Com. Dig. tit. "Action upon the Case," A. The statute West. Second, c. 50, gives a remedy by action on the case to all who are aggrieved by the neglect of any duty created by statute—see 2 Inst. 486; and in Com. Dig. tit. "Action upon Statute," F, it is laid down that "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." Therefore, the simple enactment requiring the supply of medicines would have entitled the plaintiff to an action, in the same manner as if the obligation had been imposed by the common law, or had been expressly included in the ship's articles. However, the 18th section of the 7 & 8 Vict. c. 112, which creates the duty, also makes the party who ought to perform it liable to a penalty for non-performance, to be recovered at the suit of any person, and to be applied in part to the informer and the residue to the Seamen's Hospital Society. The penalty being annexed to the offence in the very clause of the act creating it, no indictment or other proceeding could be taken against the person making default for the mere breach of the duty cast upon him by the act.

The duty being one of a public nature, the defaulter would be subject by the common law to an indictment for a breach of it, except

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for the particular mode of punishment by a penalty prescribed by the act. As far as the public wrong is concerned there is no remedy but that prescribed by the act of parliament. There is, however, beyond the public wrong, a special and particular damage sustained by the plaintiff by reason of the breach of duty by the defendant for which he has no remedy, unless an action on the case at his suit be maintainable; and the question is, whether the penalty annexed to the offence includes the plaintiff who has sustained special and particular damage, as well as the public, though no part of the penalty is payable to him.

If the performance of a new duty created by act of parliament is enforced by a penalty recoverable by the party grieved by the non-performance, there is no other remedy than that given by the act either for the public or the private wrong; but by the penalty given in the act now in question (the 7 & 8 Vict. c. 112,) compensation for private special damage seems not to have been contemplated. The penalty is recoverable in case of a breach of the public duty, though no damage may actually have been sustained by anybody; and no authority has been cited to us, nor are we aware of any in which it has been held that in such a case as the present the common-law right to maintain an action in respect of a special damage resulting from the breach of a public duty (whether such duty exists at common law or is created by statute) is taken away by reason of a penalty recoverable by a common informer being annexed as a punishment for the non-performance of the public duty. In a case cited, 1 Roll. Abr. tit. "Action sur Case," (M) 16, it appears to have been held that a person having, without the king's license, imported cards into England, contrary to the statute 3 Edw. 4, he was not liable to an action at the suit of one to whom the king had granted a license to import cards, paying a rent to the king, and who alleged he was thereby disabled from paying his rent; as the statute provides that the cards unlawfully imported were forfeited, and the remedy given by the statute ought to be pursued. There, however, the prohibition does not seem to have been intended for the benefit of the person to whom the license was granted; the damage which he sustained may have been considered as too remote. The case of *Stevens v. Jeacocke*, 11 Q. B. Rep. 731, is clearly distinguishable from the present. No duty was by the statute in that case imposed upon the defendant; he was only prohibited, under a penalty, from exercising the right of fishing to the extent he had it at the common law. He was not bound to perform any particular duty created by the act, but to forbear to do that which but for the act he might have done. The cases cited as authorities for that decision are not applicable to the present case. In *Underhill v. Ellicombe*, M'Cle. & Y. 450, it was held that where highway rates were payable by the provisions of a statute which prescribed a particular mode for their recovery, that mode only could be pursued; and in *Doe d. the Bishop of Rochester v. Bridges*, 1 B. & Ad. 847, it was held that a statute having prescribed a particular mode for the recovery of an equivalent for land-tax redeemed, no other mode could be adopted for enforcing

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the payment of the equivalent. In the present case, if the statute had prescribed a particular mode by which a person sustaining actual damage by reason of a breach of the duty imposed by the statute was to receive compensation, undoubtedly that mode only could be adopted. But the statute 7 & 8 Vict. c. 112, has made no provision for compensation to a person sustaining special damage by reason of a breach of the duty prescribed by the act, nor are there any words taking away the right which the injured party would have at common law to maintain an action for special damage arising from the breach of a public duty; the penalty given by the statute being applicable only to the public wrong and not to the private damage. In the case of *Rowning v. Goodchild*, 2 W. Black. 906, an action upon the case was held to be maintainable against a deputy postmaster for a breach of duty in not delivering a post letter as required by the 9 Anne, c. 10, though he was, by the same statute, liable to a penalty for detaining letters. The objection was taken, but overruled, the Court being of opinion that though the duty was created by statute the action lay at common law. In that case, as in this, the penalty was recoverable by a common informer, and not by the party grieved. Upon principle, then, as well as upon authority, as far as we have been able to find any upon the point, we think the second count is maintainable, and that the plaintiff's right by the common law to maintain an action on the case for special damage sustained by the breach of a public duty is not taken away by reason of the statute which creates the duty imposing a penalty recoverable by a common informer for neglect to perform it, though no actual damage be sustained by any one. The multiplication of vexatious actions which was to be apprehended if we had not held that the first count of the declaration was insufficient cannot arise from our supporting the second, for the plaintiff cannot recover upon it without proving that the medicines required by the Board of Trade were not supplied, and that thereby his health suffered; and upon such proof, it is fit that he should have a compensation in damages.

Judgment for the defendant on the first count, and for the plaintiff on the second count.

DEAN AND ANOTHER v. HORNBY.¹

January 17, 1854.

Ship and Shipping — Insurance — Capture by Pirates — Recapture — Total Loss — Notice of Abandonment — Means of obtaining Possession by Assured.

A vessel insured by a time policy was, during the risk, captured by pirates, and being shortly after recaptured by an English ship of war, was taken possession of by a prize

¹ 23 Law J. Rep. (N. S.) Q. B. 129; 18 Jur. 623.

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crew, and sent to England for the purpose of being adjudicated upon in the Court of Admiralty. While on her return, and after the expiration of the risk, she met with sea damage, and was taken into a port to be repaired, where she was sold by the prize master. From the time of the recapture to the sale, the ship was in the possession and under the control of the prize crew, and not of her own crew. On her arrival in England, proceedings were taken in the Admiralty Court without prejudice to the legal right of the parties, and possession was decreed to the owners. After the termination of the risk, but as soon as the assured received intelligence of the capture by the pirates, they gave notice of abandonment:—

Held, that under the above circumstances, the assured were entitled to recover as for a total loss.

THIS was an action on a policy of insurance. The following case was stated for the opinion of the court under the provisions of the 15 & 16 Vict. c. 76, s. 46.

The *Eliza Cornish* was insured from the 22d of April, 1851, to the 21st of April, 1852, under the following policy, which was duly underwritten by the defendant and fifteen other underwriters. The case then set out the policy, which was in the usual form, stating the perils insured against to be “of the sea, men-of-war, fire, enemies, pirates, rovers, thieves, jetsams, letters of mart and counter mart, surprisals, takings at sea, arrests, restraints and detainerments of all kings, princes and people of what nation, condition or quality soever, bartrary of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c.”

On the 7th of November, 1851, the *Eliza Cornish* set sail on her homeward voyage from Valparaiso to Liverpool with a cargo and crew consisting of the master and six hands. On the 1st of December, 1851, she put into Punta Arenas, in the Straits of Magellan, to repair some slight sea damage she had received. On the same day she was boarded by an armed force from the shore, who took forcible possession of her, and placed the master and crew under restraint, and conveyed them as prisoners on shore. A Mr. Dean, a brother of the plaintiff, who was on board, was also taken on shore by them. The persons who committed this outrage were Chilians, acting under the orders of one Lieutenant Cambiaso. The Chilian government had a penal settlement at Punta Arenas which had been placed under the charge of a governor named Munioz, of a Captain Salas and others, among whom was a Lieutenant Cambiaso and a few soldiers. Shortly before the arrival of the *Eliza Cornish* there was a meeting and insurrection at the settlement. Cambiaso and some of the soldiers conspiring with the convicts against Munioz, Munioz was shot by them, the soldiers overpowered, and Cambiaso assumed the command. Nothing was known of these events by those on board the *Eliza Cornish* when she put into Punta Arenas as aforesaid as a friendly port. Having taken possession of the said vessel as aforesaid, the insurgents, under the command of Cambiaso, shot the master and Mr. Dean, and kept the crew in confinement. The insurgents threw overboard all the upper part of the cargo, consisting of guano, cocoa and bark, and plundered her of treasure amounting to 108,000 dollars, or about 20,000*l.* sterling. The mate of the vessel remained in confinement until the 13th of December, 1851, when, fearing that

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he would be shot if he refused, he agreed to navigate the vessel to Aranco, and he and the remainder of the crew prepared the vessel for sea again, working under a guard of soldiers and being placed in confinement on shore at night. On the 31st of December from 180 to 200 persons were placed on board with cannon and other arms, and a piratical flag. On the 2d of January, 1852, the vessel got under weigh in company with the Florida, an American vessel which Cambiaso's party had also seized; Cambiaso taking command of the Florida, and his second in command, named Briones, took command of the Eliza Cornish. Briones and his men exercised themselves with arms, and occasionally hoisted the piratical flag.

On the 28th of January, 1852, before the Eliza Cornish got clear of the Straits of Magellan, she was rescued by Her Majesty's steam ship Virago, which vessel had been sent from Valparaiso for the purpose, at the request of the Chilian government, and most of the treasure which was found on the persons of the insurgents who were on board the Eliza Cornish and the Florida was recovered and reshipped on board the Eliza Cornish. The commander of the Virago took possession of the Eliza Cornish, and put two officers and some men in charge of her, with directions to take her to Valparaiso. She arrived at Valparaiso on the 23d of February, 1852, where she remained in the custody and possession of the officers of the Virago. On the 10th of March, 1852, she again left Valparaiso for Liverpool with the remainder of her cargo, in charge of one Charles Bowden, one of the commissioned officers of Her Majesty's ship Dædalus, with two other officers and eight seamen belonging to the Virago and Dædalus. These officers and men were placed in charge of her by the commander of the Virago, who sent her to England with instructions to have the matter adjudicated upon by the Court of Admiralty. The mate and four of the crew of the Eliza Cornish also remained on board.

The Eliza Cornish had received no damage, and sailed from Valparaiso with much the largest part of her cargo, which was very valuable. The vessel on her homeward voyage met with bad weather, and bore up for Monte Video to repair sea damage on the 14th of April, 1852. She arrived there on the 24th of April, 1852. She sailed again, after being repaired, on the 25th of June, 1852, and having again met with bad weather and suffered damage, she was obliged to put into Fayal, where she arrived on the 19th of August, 1852. On the 21st of August, 1852, she was surveyed. Two subsequent surveys were held upon her, when the surveyors recommended that she should be sold as unfit for repairs, and she was afterwards sold by the said Charles Bowden, and the proceeds of the sale were received by him. From the time she last left Valparaiso until the time of her sale at Fayal she was in the possession and under the control of the said Charles Bowden under the circumstances before mentioned. She was repaired by the purchaser at a trifling expense and has since arrived in England, and therefore Mr. Bowden was not justified in selling her.

In the early part of the year 1853, after it was discovered that the

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Eliza Cornish (her name having been changed to the Segredo,) had arrived in England, proceedings were taken against her in the Admiralty Court by the plaintiffs and the defendant in concert, which proceedings, by previous agreement between them, were to be without prejudice to either of the said parties as to their legal rights under the circumstances above set forth, as if such proceedings had not been taken; and the Court of Admiralty having decreed the possession to the owners, she has been sold, with the consent of the plaintiffs and the defendant, and the money deposited to await the result of this case.

The plaintiffs received intelligence of the seizure of the vessel at Punta Arenas, of her capture by the *Virago*, and of her having been taken to Valparaiso in charge of a prize crew at the same time, namely, about the end of April, 1852; and on the 30th of that month they addressed to the defendant and the other underwriters the following notice of abandonment:—

“Liverpool, April 30, 1852.

“Messrs. HEADLAM & LANGTON, Liverpool.

“Gentlemen,—Having been informed by Mr. Myers, of the firm of W. J. Myers & Co., that intelligence has arrived of the condemnation at Valparaiso of the brigantine *Eliza Cornish*, as a prize to Her Majesty's steamer *Virago*, we will thank you to inform the underwriters on our policy on that vessel, effected through you for 800*l.* on the 14th of May, 1851, that we abandon to them and the other underwriters on that vessel at Lloyd's, London, our interest therein, and claim a total loss on our policies, and will thank you to send us in a credit note for the amount, as customary. We remain, &c.

“DEAN & MILLS.”

To which they received the following reply:—

“Gentlemen,—We have received your favor of yesterday, tendering abandonment to the underwriters of the *Eliza Cornish*, as far as regards a policy for 800*l.* of the 14th of May, 1851, and we are instructed by them to decline accepting of the same for the present. Yours truly,

“HEADLAM & LANGTON.”

Neither the mate nor the crew of the *Eliza Cornish* or any one else on the plaintiff's behalf ever had possession of or control over the said vessel after she was first taken possession of on the 1st of December, 1851, at Punta Arenas, by the Chilian insurgents.

The court was to be at liberty to draw any conclusion of fact which a jury might draw; and in case the court should be of opinion that an average loss only had been incurred, the amount was to be settled out of court by an average adjuster agreed upon between the parties. And the opinion of the court was desired, whether the plaintiff was entitled to be paid by the defendant as for a total loss of the said vessel under the said policy.

J. Wilde, for the plaintiffs.—The plaintiffs are entitled to recover.

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There was a total loss within the terms of the policy when the ship was seized by the insurgents. Notice of abandonment was given as soon as intelligence of the loss was received, and the ship was never afterwards in a state in which her owners could be reasonably expected to take possession of her. *Holdsworth v. Wise*, 7 B. & C. 794, is the leading case on this subject, and shows that if there is that which at the time constitutes a total loss, and notice of abandonment is duly given, the loss continues total unless the ship is *in esse* in the kingdom under such circumstances that the assured may, if they please, have possession and be reasonably expected to take it. *Parry v. Aberdeen*, 9 Ibid. 411, shows that the test is, not whether the subject-matter of the insurance exists *in specie*, but whether the assured could, under the circumstances, have any benefit from it. *Thornely v. Hebson*, 2 B. & Ald. 513, was decided on the ground that there never was what could amount to a total loss. *M'Iver v. Henderson*, 4 M. & S. 576, is directly in point to the present case. There being a loss by capture and abandonment, as here, the ship was never restored before action to the assured, except upon his depositing a large sum to abide the event of an appeal. She was not in a state to complete her voyage, and this was held to give a right to recover as for a total loss. In this case the ship continued to be under the control of the officers and crew of the *Virago*, who had a claim for salvage, which gave them a lien on her. *Hartford v. Jones*, 1 Lord Raym. 393.

Cowling, contra. — There was here no total loss at the time when the notice of abandonment was given. It was given under a mistaken idea that the ship was a prize to the *Virago*, which could not be the case, as our government was not then at war with the Chilian government. No doubt, there was a constructive total loss when the ship was seized by the pirates; but the property was not changed by the seizure, and upon the recapture it still remained in the owners, although the possession was in the Queen for the purpose of having full justice done to all parties by an adjudication in a Court of Admiralty. There was a lien, but nothing more, and the 13 & 14 Vict. c. 26, operates to give the recaptors a lien to the extent of one eighth. As to the other seven eighths, the crew held the ship for the owners. Independently of that statute there would have been no lien. Case of Piracy, 12 Rep. 73; and the Admiralty Court must have decreed a return of the ship without diminution. In such a case there could be no abandonment. Here the salvage decreed may be very small; and if the ship arrives at her destination, even after action, the owners would be entitled to the freight.

[LORD CAMPBELL, C. J. Do you say that the right of the owners to recover possession does away with the total loss, although there are no means of recovering the possession?]

Yes, if the owners know that the possession must ultimately come to them, they having only to pay the amount of the lien, as there is no adverse holder in possession. *Thellusson v. Shedden*, 2 N. R. 228.

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[LORD CAMPBELL, C. J. Was not the sale at Fayal the consequence of the capture by the pirates?]

It was a wrongful sale; as it took place after the expiration of the policy, and was made by parties who had no right to sell. The only question is, whether, at the time when the notice of abandonment was given there was a total loss, not afterwards. *Roux v. Salvador*, 3 Bing. N. C. 266. The utmost which has here happened is a retardation of the voyage, and the notice of abandonment could not therefore turn that which was a mere partial loss into a total loss. *Brainbridge v. Neilson*, 10 East, 329.

[WIGHTMAN, J. Must not the ship be *in esse* under such circumstances that the owner may, if he pleases, take possession of her?]

If a vessel is at sea she cannot be taken possession of bodily; it is sufficient if she can be taken possession of when she reaches her destination. In *Holdsworth v. Wise* the salvage exceeded the value of the ship. In *Parry v. Aberdeen* the subsequent events were of no real benefit to the owner. Those cases, therefore, have no bearing on the present.

Wilde, in reply. The question really is, as put in *Holdsworth v. Wise*, whether, after the total loss, the ship was ever in such a position that the assured might and could reasonably be expected to take possession of her. There is nothing here to show, as there, that the salvage does not exceed the value. A restoration to the owners after action cannot cut down a total loss existing before. *Bainbridge v. Neilson* is quite in accordance with all the previous cases. As to the doctrine cited from *Roux v. Salvador*, it does not apply; for here, by reason of the perils insured against, the vessel did not arrive. The voyage insured was at an end by the capture; and her afterwards coming to England was not for the purpose of performing that voyage and earning freight, but for the purpose of being condemned in the Court of Admiralty. There is a great difference between the voyage insured and the *iter navis*. No doubt, the mere loss of the voyage is not a total loss; but when there has been a total loss otherwise caused, it is material to see whether the voyage has been continued or not. The existence of the lien is quite immaterial. The question turns on the *fact* of possession and whether the assured have been damnified. *Godsall v. Boldero*, 9 East, 72. Here when the writ issued the plaintiffs were damnified, and are entitled to recover.

LORD CAMPBELL, C. J. I am of opinion that, according to the principles of insurance law, and the decided cases, the plaintiffs are entitled to judgment. By this policy the underwriters undertook for the safety of the ship *Eliza Cornish* from the 22d of April, 1851, to the 21st of April, 1852. During that period, on the 1st of December, 1851, the *Eliza Cornish* was taken by pirates. At that time in point of fact a total loss accrued to the plaintiffs. She was afterwards rescued from the pirates by the *Virago*, but from that time to the present she has never been restored to the owners, nor have they ever had the means of taking possession of her. By events, over which

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they had no control, they have lost their property, and are entitled to be indemnified by the underwriters. The principle laid down in the cases is, that if there be once a total loss by capture, it will still continue to be a total loss, unless something afterwards occurs by which the assured either has the property restored to him or the means of obtaining its restoration. It is immaterial that the assured still have the right to the property, as they certainly have, because the pirates could not gain any property in the ship, and she could be claimed by her owners at any time. We are to see whether at any time the owners had an opportunity of taking possession, or whether she was in fact ever restored to them. This seems to be the rule laid down in *Holdsworth v. Wise*, *Parry v. Aberdeen*, *M'Iver v. Henderson*, and *Neilson v. Bainbridge*. That principle also was recognized in *Thornely v. Hebson*, where there was no total loss. Here there clearly was a total loss. If so, when did it cease to be so? Down to the time of the action being brought the property was not restored to the assured, nor had they the means of obtaining it. The ship was carried into Fayal by the prize crew, and it is immaterial whether the possession after that was rightful or wrongful, because the ship was never restored to the owners. The notice of abandonment was given quite in due time,—immediately after intelligence was received of the misfortune. It is said that before the time when this notice was given, the 21st of April, 1852, had arrived, and that, therefore, the underwriters are not liable for any thing which occurred after that day; but I think if the assured gave notice of abandonment as soon as they received the intelligence, although after the expiration of the period mentioned in the policy, it is sufficient. It was then said that the ship had been condemned at Fayal, but we have only to look to the facts which occurred before that time. We must suppose that notice of abandonment was given upon those facts, and I think the assured had a right to abandon upon those facts, and, therefore, that the loss has always been total.

COLERIDGE, J. I am of the same opinion. Here there was a capture by pirates; if there were nothing more than this it could not be doubted that there was at that time a total loss. The question is, whether what has occurred since has made the loss partial. The material facts are these:—On the piratical voyage the ship was recaptured, a prize crew put on board, and she was sent to England, not in pursuit of her original voyage, but in order to be adjudicated upon by the Court of Admiralty, and afterwards she was sold by the prize-master. What occurred after the ship arrived here, it is agreed we are to take no notice of. It appears to me that the property has never been altered. The material point is, whether there has been a taking possession of her by the assured, or the means of getting control over her. It seems to me that the possession has never been restored to the owners. If that be so, the effect of the original capture has never been done away with; and the notice of abandonment, being given within a reasonable time, was perfectly good.

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WIGHTMAN, J. It is conceded that at one time there was a total loss. The question is, whether it has been changed into a partial loss by what afterwards occurred. In order for this to be the case, there must be either a restitution of the ship or the means of obtaining possession of her. Here the owners have never had a restitution, or, as it seems to me, the means of taking possession. What took place after the capture was the act of the recaptors, and the ship was entirely out of the control of the assured. The recaptors, instead of taking her on her original voyage, took her to another port, and there sold her. The owners have never had possession since the ship was captured by the pirates. It seems to me that the loss, which was total at one time, never ceased to be so. The case is, therefore, not like *Cologan v. The London Assurance Company*, 5 M. & S. 447.

Judgment for the plaintiffs.

TURNEY v. DODWELL.¹

January 27, 1854.

Limitations, Statute of — Part Payment by Bill — Acknowledgment.

Where a bill of exchange is delivered by a debtor to his creditor, in payment on account of a larger sum then due, under such circumstances as to raise the implication of a promise to pay the remainder, it amounts to a payment within the meaning of the exception in the 9 Geo. 4, c. 14, s. 1, and answers the Statute of Limitations, as from the time of such delivery, whether the bill be subsequently honored or not.

ACTION by the plaintiff, as payee of a promissory note made by the defendant, on the 5th of May, 1843, for the payment of 108*l.* 15*s.* on demand. There was a second count on a bill of exchange for 30*l.* drawn on the 15th of February, 1848, by the plaintiff upon and accepted by the defendant.

Pleas. To the first count, the Statute of Limitations; to the second count, payment into court of 30*l.*

The plaintiff joined issue on the first plea, and took the 30*l.* out of court in satisfaction.

At the trial, before Jervis, C. J., at the Bedfordshire summer assizes, 1853, it appeared that the defendant, being indebted to the plaintiff, on the 5th of May, 1843, gave to him the promissory note for 108*l.* 15*s.* mentioned in the first count. In February, 1848, the defendant, who had been pressed to pay part of his debt, drew the bill for 30*l.* the subject of the second count, and delivered it to the plaintiff in part payment of the promissory note. Upon this evidence the plaintiff had a verdict for 123*l.* 10*s.*, the amount of the promissory note and interest, with liberty to the defendant to move to enter a verdict, if the giving of the bill of exchange were not sufficient to

¹ 23 Law J. Rep. (N. S.) Q. B. 137; 18 Jur. 187; 2 Com. Law Rep. 666.

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take the case out of the Statute of Limitations. A rule nisi to enter the verdict having been obtained in pursuance of the leave reserved,

Power and *Wroth*, showed cause.¹ The giving of the bill of exchange under the circumstances took the promissory note out of the Statute of Limitations, on the ground that any thing which is given in reduction of the debt, whether it be money, goods, or negotiable security, operates as part payment, and is evidence of a new promise. *Tanner v. Smart*, 6 B. & C. 603; and *Hooper v. Stevens*, 4 Ad. & E. 71. No doubt the bill operates as payment only conditionally upon its being taken up when due, but that is sufficient for the purpose of raising a new promise; otherwise it might be necessary to sue on the bill before it could take the original debt out of the statute. Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 1, applies to acknowledgments by words only, but leaves part payment as it was before. *Belshaw v. Bush*, 11 Com. B. Rep. 191; s. c. 14 Eng. Rep. 254. The word "payment" in reference to negotiable securities is defined in *Mailard v. The Duke of Argyll*, 6 Man. & G. 40; *Richardson v. Rickman*, cited in *Kearslake v. Morgan*, 5 Term Rep. 578; *Griffiths v. Owen*, 13 Mee. & W. 58; and also in other cases, *Wilkins v. Casey*, 7 Term Rep. 711, and *Bishop v. Crawshay*, 3 B. & C. 415. Secondly, the amount of the bill being paid into court in this action, it is actually paid; and the payment relates back to the date of the bill so as to take the case out of the Statute of Limitations. *Turner v. Veitch*, 3 Mee. & W. 90. *Gowan v. Foster*, 3 B. & Ad. 507, is a converse case to the present. But it may be said that, as this bill was paid since action, that case does not apply, and *Bateman v. Pinder*, 3 Q. B. Rep. 574 may be cited, but there was there a mere payment after action, not a payment on account of a bill given before action.

O'Malley, in support of the rule. It is conceded that a bill operates as payment from the time when it is actually paid; but it would be a strange doctrine if a bill, which it is admitted is only a conditional payment when given, becomes when paid an absolute payment as from its date. *Tanner v. Smart* has settled that nothing which is not evidence of a new promise within six years will prevent the operation of the Statute of Limitations. Part payment, therefore, is an answer to the statute only if it be made under such circumstances as to amount to a promise to pay the residue of the debt. *Cripps v. Davies*, 12 Mee. & W. 159. Therefore, the part payment must take place before action, and payment into court cannot be of any avail, especially as it expressly excludes there being any thing more due. *Bateman v. Pinder* is directly in point as to this. Then, as to the first point argued for the plaintiff. The mere giving a bill which is not paid when it falls due cannot be payment. Payment must be something which discharges the debt. The plaintiff here sues for the bill as unpaid, and yet treats it as paid for another purpose. If

¹ Jan. 16. Before Lord CAMPBELL, C. J., COLERIDGE, J., ERLE, J., and CROMPTON, J.

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a party gives a bill on account of a debt for which he is only collaterally liable, the laches of the holder may as against him be treated as payment, but it could not be pleaded as payment.

[ERLE, J. I think it could.]

Chamberlyn v. Delavie, 2 Wils. 353, is to the contrary.

[CROMPTON, J. The question is, whether this is not payment within the meaning of the exception in Lord Tenterden's Act.]

Gowan v. Foster and *Irvine v. Veitch*, which have been referred to, do not decide this point. *Foster v. Dawber*, 6 Exch. Rep. 839; s. c. 6 Eng. Rep. 496, is an authority against any new promise to pay being inferred in such a case as this, where all that appears is that the bill was given on account of the note.

[LORD CAMPBELL, C. J. We must take it that it was given on account of the whole debt and as part payment.]

It does not on its face admit that any larger sum is due; and no verbal statement to that effect could be received.

[ERLE, J. Surely it could as part of the *res gesta*.

LORD CAMPBELL, C. J. If a man gives a bill for 50*l.*, and at the same time says to his creditor here is 50*l.* off your debt, I should think it admissible.]

At all events, there is no such evidence here. *Cur. adv. vult.*

Judgment was now delivered by

LORD CAMPBELL, C. J. The only question in this case was, whether a part payment by a bill of exchange, drawn by the plaintiff and accepted by the defendant, was sufficient to take the case out of the Statute of Limitations. The circumstances under which the acceptance was given, were such as to show that the payment was made as a part payment of the whole amount due, so as to raise the implication of a fresh promise, and, therefore, to be an answer to the defence of the Statute of Limitations, if the part payment by bill were a part payment within the 9 Geo. 4, c. 14. It was said, on the part of the defendant, and we think correctly, that we ought to assume that the payment in question was not an absolute payment in satisfaction, so as to be a discharge if the bill were dishonored. If the payment had been one of absolute satisfaction, no question could have arisen; and we have, therefore, to consider whether the payment in the usual manner in which bills of exchange are given and taken in payment is a payment within the proviso of the 9 Geo. 4, c. 14, by which the effect of part payment is preserved. The counsel for the defendant referred us to the case of *Gowan v. Foster*, where a doubt was expressed as to whether the drawing of a bill was a sufficient acknowledgment within the 9 Geo. 4, c. 14, and to the case of *Foster v. Dawber*, where the Court of Exchequer thought that under the circumstances no promise to pay any balance could be implied in the particular case; but there is nothing to show that they thought that a part payment by bill might not be an acknowledgment to take the case out of the Statute of Limitations as to the remainder.

On the other hand, in the case of *Irvine v. Veitch*, the expressions

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used by the learned barons lead us to suppose that they thought such part payment by bill sufficient. In both *Foster v. Gowan* and *Irvine v. Veitch*, it was unnecessary to determine the point now in question, as the courts most properly held that the acknowledgement, if any, was at the time of delivering the bills in part payment, and not at their subsequent payment by the parties on whom the bills in those cases were drawn. At the trial in the present case, the Lord Chief Justice of the Common Pleas held that the part payment was sufficient to take the case out of the Statute of Limitations, and we entirely concur in that ruling. Before the statute 9 Geo. 4, such a part payment was clearly sufficient to take the case out of the Statute of Limitations, as amounting to an acknowledgement of the balance being due, and the real question is whether such payment by bill, though not received in absolute satisfaction, is not a payment within the proviso in that statute. The effect of giving a bill of exchange on account of a debt is laid down by Maule, J., in the recent case of *Belshaw v. Bush*, approving the doctrine of the Common Pleas in *Griffiths v. Owen*, and of Alderson, B. in *Jones v. Williams*, 13 Mee. & W. 883. In all those authorities, such a delivery of a bill is laid down as a conditional payment. We do not see why its immediate operation as an acknowledgement of the balance of the demand being due is at all affected by its operation as a payment being liable to be defeated at a future time. The statutes intending to make a distinction between mere acknowledgements by word of mouth, and acknowledgements proved by the act of payment, it surely cannot be material whether such payment may afterwards be avoided by the thing paid turning out to be worthless. The intention and the act by which it is evinced remain the same. We think that the word "payment" must be taken to be used by the legislature in a popular sense, and in a sense large enough to include the species of payment in question; and we should think the acknowledgement of liability as to the remainder of the debt not at all altered by the fact of the notes, by which it was paid, turning out to be forged, or of the coin turning out to be counterfeit. In all these cases, the force of the acknowledgement is the same, and the payment is, we think, a sufficient payment within the words of the 9 Geo. 4. In *Maillard v. The Duke of Argyll*, the Court of Common Pleas distinctly held, that the word "payment," as applicable to a transaction of this kind, even when used in a plea, did not mean payment in satisfaction, but might be treated as used in its popular sense; and Maule, J., in that case, says that "'payment' is not a technical word; it has been imported into law proceedings from the Exchange and not from law treatises." When you speak of paying by cash, that means in satisfaction, but when by bill, that does not import satisfaction unless the bill is ultimately taken up. In *Belshaw v. Bush* the Lord Chief Justice of the Common Pleas, in speaking of a transaction of this nature, says "the real answer is, that upon this record you have been paid your debt;" and in the very report now before us the learned Lord Chief Justice calls the present transaction a part payment. In mercantile transactions, nothing is more usual than to stipulate for a payment by

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bills where there is no intention of their being taken in absolute satisfaction. We are satisfied that a transaction of this nature is properly described by the word "payment," and that it is clearly within the class of acknowledgements intended to be unaffected by the statute; and we are satisfied that there is no reason whatever to restrict the expression in the statute to that species of payment which imports a final satisfaction. The defendant's case, which rested entirely on the proviso in the 9 Geo. 4, being so restricted, therefore fails in its foundation; and we think that where a bill of exchange has been so delivered in payment on account of the debt as to raise an implication of a promise to pay the balance, the Statute of Limitations is answered as from the time of such delivery, whatever afterwards takes place as to the bill. The ruling of the Lord Chief Justice at the trial being, in our opinion, perfectly correct, this rule must be discharged.

*Rule discharged.*¹

PHELPS AND ANOTHER v. PREW.²

February 6, 7, and 8, 1854.

Action of Covenant — Assignees of Reversion — Assignment subject to Mortgage Debt — Privilege of Attorney and Client — Production of Title Deeds — Secondary Evidence.

Action by the assignee of the reversion on a covenant in a lease. The deed of assignment of the reversion to the plaintiffs, was subject to certain "mortgage debts." The defendant, in order to prove that the legal estate was out of the plaintiffs, called the attorney of a person to whom the mortgage (subject to which the assignment had been made) had been transferred, to produce the mortgage deed under a *subpœna duces tecum*. The attorney refused to produce it, and said that his client had instructed him not to produce it. Another witness was then called to give secondary evidence of the contents of the deed, by means of a draft; and in order to identify the deed with the draft, the judge ordered the attorney to produce the deed, and to allow the second witness to look at the indorsement; upon which the witness identified it as the deed of which the draft was a copy, and thereupon secondary evidence was received of the contents of the deed: —

Held, first, that the privilege of the client was not violated by requiring the attorney to show the indorsement on the deed.

Secondly, that the omission to subpœna the client was, under the circumstances, no ground for excluding secondary evidence of the contents of the deed.

Thirdly, by Crompton, J., and *semble*, by Coleridge, J., Wightman, J., and Erle, J., that if the privilege of the client had been violated, the party to the action against whom the evidence was admitted, could not make it a ground of application for a new trial.

¹ The same decision was made in Massachusetts, in *Isley v. Jewett*, 2 Metcalf, 168, (1840,) when the negotiable note of a debtor given for part of a debt, was held such a part payment of debt as to avoid the statute. But that decision might have

rested in part upon the law peculiar to that State and Maine, that a negotiable note given for a simple contract debt, is always *primâ facie* payment thereof, and is always so treated in those courts, however the question may arise.

² 23 Law J. Rep. (N. S.) Q. B. 140; 18 Jur. 245.

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THIS was an action by the plaintiffs, as assignees of the reversion, upon a covenant to repair in a lease of a messuage and premises for nine years from the 25th of March, 1846, alleged to have been made by T. E. Poole, who was tenant for life, in right of his wife, to the defendant.

Pleas — first, a denial of the estate of Poole for life, in right of his wife; secondly, that the plaintiffs were not, during the said term, grantees or assignees of the said tenements, or of the reversion therein, within the meaning of the 32 Hen. 8, c. 34, concerning the right of grantees of reversion, to take advantage of the conditions to be performed by the lessees.

On the trial, before Martin, B., at the Bridgewater Summer Assizes, 1853, the plaintiffs put in the original lease dated in 1845, and a conveyance of the reversion to the plaintiffs by Poole and his wife and their children, dated the 1st of October, 1851. This deed contained a recital that Poole, in right of his wife, was seised for the life of his wife, subject to certain mortgage debts of 700*l.* and 300*l.*, and that Poole was also entitled to two fourths of the reversion in fee; and by it the property in question was conveyed to the plaintiffs, subject and charged as thereinbefore mentioned, upon certain trusts, for the benefit of Poole and his wife. It was objected for the defendant that the title of the plaintiffs was in issue, and that the recital in the conveyance to the plaintiffs showed that the legal estate was out of issue. For the plaintiffs it was urged, that the words "mortgage debts" might be answered by a deposit merely of title deeds, and in that case the legal estate would have passed to the plaintiffs. The learned judge construed the words to mean debts on mortgage, and *prima facie*, a transfer of the legal estate to the mortgagee was implied; but he was of opinion that there was evidence to go to the jury of the seisin of Poole and his wife. Mr. Dent, one of the witnesses for the parties to whom the mortgage had been transferred, and who had been served with a *subpœna duces tecum* to produce a mortgage deed of the 5th of December, 1846, was called as a witness for the defendant. Upon his examination, Mr. Dent stated that the mortgage deed which he had was the title deed of his client, and that he had been instructed by his client not to produce it. Mr. Woodcock, a junior solicitor, was then called to give secondary evidence of the contents of the deed. He stated that he had acted for Hayley, the original mortgagee, who had been paid off, and that he had attended to the execution of the mortgage deed. That he had a copy of a mortgage deed, but did not know whether it was a copy of the deed in question, unless he knew what that deed was. It was then suggested that Woodcock should be allowed to look at the names of the parties and the parcels in the deed, in order to identify it. Mr. Dent refused to produce it for that purpose, and it was contended that he ought to be called before the admission of secondary evidence. The learned judge ordered the production of the deed, that Woodcock might inspect the indorsement. Woodcock accordingly looked at the indorsement, and said that he identified it as the mortgage deed to which he was an attesting witness, and he gave accordingly a statement

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of the contents. In summing up, the learned judge told the jury that the fair inference was, that it was a mortgage made since the lease. The jury gave a verdict for the defendant upon the second issue, and for the plaintiffs upon the first issue; leave being reserved to move to enter a verdict for the plaintiffs upon the second issue, if the court should be of opinion that there was no evidence to go to the jury for the defendant.

In the following Michaelmas term a rule *nisi* was accordingly obtained for a new trial, on the grounds, first, that the recital was not of itself sufficient evidence of the legal estate not being in the plaintiffs; and, secondly, that secondary evidence of the mortgage deed was improperly admitted, because all the means of adducing the primary evidence had not been exhausted, the mortgagee not having been subpoenaed.

Crowder and *Barstow* showed cause. The deed of conveyance put in by the plaintiffs was abundant evidence to show that the action could not be maintained; and if a Judge at the trial improperly admits evidence, and there is enough without such evidence to support the issue, the Court will not grant a new trial. The declaration states that the plaintiffs being seised, granted a lease; and they are, therefore, estopped from saying that they had not then the legal estate. It sufficiently appears from the recital that the mortgages were before and not after the lease, but, whether before or after, the plaintiff has no title. If before, it would be a title by estoppel, and would not pass to the plaintiffs, but the mortgages cannot certainly be taken to be before the lease. *Green v. James*, 6 Mee. & W. 656, 660.

[CROMPTON, J. Does it appear that these were mortgages of the legal estate?]

The assignment to the plaintiffs shows that it is an assignment of an equitable title, and it is for the plaintiffs to make out clearly an assignment of the legal reversion, *Doe d. Welsh v. Langfield*, 16 Ibid. 497; *Carrich v. Blaggrave*, 1 Brod. & B. 531; *Lush v. Russell*, 5 Exch. Rep. 203; and *Pargeter v. Harris*, 7 Q. B. Rep. 708, 727. But, further, the title by estoppel would not be transferred with the reversion to the assignees. *Doe d. Prior v. Ongley*, 10 Com. B. Rep. 25, 32; and *Bayley v. Bradley*, 5 Ibid. 396. Even if the mortgages were before the lease, the title by estoppel would not pass to the assignees.

February 7. The Court upon this point, called upon—

M. Smith and *Prideaux*, contra. From the words "subject to certain mortgage debts," there is no such legal presumption as that the legal estate was outstanding. They might be equitable mortgage debts by deposit of title-deeds. The plaintiffs show title in themselves by means of the conveyance and the lease, and it is not shown to be out of them, and cannot be inferred to be out of them. In *Pargeter v. Harris*, the facts were very different, and the Court was

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anxious to do what was just between the parties. Here the defendants' construction would be against the justice of the case. Reliance was placed in that case upon the peculiar language of the recital and upon the express affirmative allegation. In *Doe d. Welsh v. Langfield*, the onus of proof was clearly upon the defendant, and the whole of the plaintiffs' case rested upon the declaration in evidence. They referred to Com. Dig. tit. "Estoppel."

Cur. adv. vult.

February 8. The Court required that the case should be agued upon the second ground of the rule.

Crowder and Barstow. What passed at the trial was sufficient to enable the defendant to give secondary evidence of the contents of the mortgage deed. No case has decided that the client as well as the attorney must be called. Here the client had given the attorney instructions not to produce the deed, and it was the same as if he had been in court and refused. *Newton v. Chaplin*, 10 Com. B. Rep. 356; is relied upon by the plaintiffs, but that is a different case from the present. The client there had given no instructions to his attorney. In *Doe d. Gilbert v. Ross*, 7 Mee. & W. 102; referred to in *Newton v. Chaplin*, secondary evidence was received, the attorney refusing to produce the deed on the ground of his lien. Further, the deed was only produced for the purpose of identification, and that was clearly no violation of the privilege; but at all events, a party to the cause cannot object on the ground of a violation of the privilege of the witness or his client. It is one thing in a case like this, where a Judge shuts out evidence offered at the trial, and quite another thing where he obliges the production of evidence. In *Doe d. Earl Egremont v. Date*, 3 Q. B. Rep. 618; Patteson, J. says, "If the Court will review a decision disallowing the privilege, that will be for the sake of the witness. I do not see how it can be done for the sake of the party."

[COLERIDGE, J. referred to *The Queen v. Garbett*, 1 Den. C. C. 236.]

Prideaux, contra. The Judge improperly compelled the production of the deed for the purpose of being identified. The attorney is not bound to answer any question which goes to show the nature of the client's deed, and the Judge ought not to examine him for the purpose of ascertaining whether the deed ought properly to be withheld, *Volant v. Soyer*, 22 Law J. Rep. (N. S.) C. P. 82; s. c. 16 Eng. Rep. 426. Parties are never compelled to produce their title deeds. *Pickering v. Noyes*, 1 B. & C. 262. Here the indorsement disclosed the nature of the deed and the names and dates. *Brand v. Ackerman*, 5 Esp. 118. The identity of the deed must be shown without in any way inquiring into the nature of the deed.

[CROMPTON, J. When a witness is called upon to produce a deed, some description of it must be given.]

[WIGHTMAN, J. When a deed is described in a *subpœna duces*

tecum or notice, and the attorney says he has the particular deed, he discloses information respecting it.]

For the preliminary purpose of bringing the deed into court, the deed must be described, but in court its identity must be made out by independent evidence.

[CROMPTON, J. Suppose the Judge was wrong in allowing the deed to be looked at, can a party to the action object?]

Doe d. Egremont v. Date shows that no difference can be made in this respect. Lord Denman there says: "One consequence of holding that the decision of the Judge at *Nisi Prius* cannot be reviewed in Banc might be that on all occasions the Judge would compel the production of the document; because it is always desirable, with a view to getting at the truth, that all evidence should be produced which is not in itself objectionable; and the Judge may feel that if he compels the production of the document his decision will be final, but that if he does not, the whole question will be liable to be raised again." In order to protect and uphold the privilege it is important that the ruling of the Judge at *Nisi Prius* should be open to review. Then, secondly, the secondary evidence was not admissible, the client not having been called to say whether he waived his privilege or not. The client may have altered his mind after the instructions had been given to the witness. *Marle v. Moore*, Ry. & M. 390; *Taylor v. Blacklow*, 3 Bing. N. C. 235. *Newton v. Chaplin*, in principle, is an authority in favor of the defendant. He referred also, to *Marston v. Downes*, 1 Ad. & E. 31; s. c. 6 Car. & P. 281; *Doe d. Egremont v. Langdon*, 12 Q. B. Rep. 711; and *The Queen v. Llanfaethly*, 17 Jur. 1123; s. c. 22 Eng. Rep. 251.

COLERIDGE, J. I am of opinion, without coming to any decision upon the first point argued yesterday, that upon the latter point the rule must be discharged. First, it is said that secondary evidence of the mortgage deed is not admissible, because all was not done to exhaust the means of obtaining the primary evidence; the facts being that the defendant being desirous of the production of the deed in evidence, the attorney of the party interested was served with a *sub-pœna duces tecum*, and was present at the trial with the deed, and on being called on to produce the deed he stated that it was the title deed of his client, and that he had received instructions from his client not to produce it. It is admitted that where an original instrument is properly withheld on the ground of privilege, secondary evidence of the contents of the instrument is receivable; but here it is said that the privilege, though properly put forward by the attorney, might have been waived by the client if he had been in court, and, therefore, this cannot be considered as an instrument properly withheld on the ground of privilege, because no steps had been taken to procure the attendance of the client at the trial. Now questions of this sort are, after all, resolvable into what is reasonable with reference to the circumstances of the particular case. The true ground is, whether it was reasonable for the party to go further under the particular circumstances of the case; and I think it was not reasonable to require the

party to go further. There was distinct evidence of the privilege being insisted upon by the client. In addition to the refusal by the attorney he had received express instructions from his client not to produce the deed, which took away all discretion on the part of the attorney, and this was the state of things at the time when the privilege was claimed. The judge was right in assuming that the client remained of the same mind, and that there was nothing to alter that state of things. I think, therefore, enough was done to let in secondary evidence. Then, the second objection is, that the judge improperly overruled the privilege in the next step in the cause. There being some doubt, when the next witness was called, whether the draft which the witness was speaking of was a draft of the deed in question, the judge, in order to ascertain that, compelled the attorney to produce the document for the purpose of identification. It is contended it was a breach of the privilege to produce the deed in evidence for any purpose whatever. But whether it is a breach of the privilege or not must depend upon the circumstances of each case. I quite agree that sometimes, as in *Brand v. Akerman*, the process of identification will require a disclosure of the contents of the deed; and if so, I think the inquiry must stop. But here I do not see that any thing was done that had the effect of disclosing the contents of the deed or violating any of the secrets which the attorney had intrusted to him by his client. The indorsement might disclose that the deed was an assignment, but of what property and whether it was of the legal or equitable estate it would not disclose. I think, therefore, the learned judge was right. It is not necessary to express any decision upon the other point, whether, if a judge improperly disallows the privilege and enforces the production of the deed, a party to the cause has a right to insist upon the point as an objection, and to move for a new trial. I do not mean to say that the Court in Banc will review the decision of the judge. I at present incline to think that the court would not.

WIGHTMAN, J. It is not necessary to express any opinion upon the last point mentioned by my brother Coleridge, because, if the judge was right, the defendant is entitled to retain the verdict. I will only observe that *Marston v. Downes* was decided after time taken to consider. The plaintiff proposed to show the legal estate outstanding in mortgage, and for that purpose the attorney of the mortgagee was called upon to produce the deed. He objected and claimed his privilege, and said that he did so by the direction of his client. The privilege was allowed, and it became necessary, in order to let in secondary evidence, to identify the deed in order to show that the witness had a copy of it. It is said the attorney has a privilege not to produce a deed even for identification. I doubt whether the word "produce" is to be taken in the sense that he is not to show the deed, and not merely that he is not to produce it to be read in evidence. It must be ascertained, first, whether the witness has got the deed required, and he may be bound to show the outside of the instrument for the purpose of identification. Here, the indorsement

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on the deed was shown only that the deed might be identified ; and I think compelling the production of the deed for that purpose was no violation of the privilege, it being necessary to show that the attorney had the deed which the *subpœna* required him to produce. Then it is said, that, in addition to calling the attorney, the client ought himself to have been called, in order that he might be asked whether he was not *then* willing that the deed should be produced. In the cases cited it does not appear that the client had said any thing about the document to his attorney, and he may have been willing that the particular document should be produced ; but here, the attorney's refusal was by the express desire of his client, and it might fairly be assumed that he was still of the same mind. I think, therefore, it was not necessary for the defendant to call the client himself on the chance of his changing his mind. It appears to me that would be unreasonable. The verdict, therefore, must stand.

ERLE, J. The question is, whether this case is taken out of the ordinary rule, that the owner of title deeds is privileged from producing them. The question is, whether the attorney is competent to prove that his client instructed him to insist upon the ground of privilege ; and I think he is. Then, the second question is, whether the judge at the trial violated the privilege by compelling the witness to show the outside of the deed. It seems to me, every rule of the common law relating to evidence ought to be considered with reference to the purpose and intent of the rule. The privilege in question is to prevent a party from having the title deeds of his estate examined and to prevent defects from being discovered. That being so, is there any danger to the title of the owner from showing the outside of his title deed for the purpose of identification ? I think not, and that the present case is not within the rule. The judge, therefore, was justified in compelling the production of the deed in order that the indorsement might be looked at. I also think, as at present advised, that if a judge at Nisi Prius makes a mistake in improperly compelling the production of a deed, the party to the suit cannot take advantage of it as an objection.

CROMPTON, J. First, it is said the judge was wrong in directing the deed to be shown for the purpose of identification. I think there was no violation of the privilege ; but, if the privilege had been violated, still I think, upon authority as well as the reason of the thing, the party to the action cannot complain of the privilege of the witness being violated and the document received. I think, by analogy to all the cases, that where a deed is improperly received, the party who has the deed brought before the court cannot have the advantage of it taken away from him. The doubt thrown out by Lord Denman in *Doe d. Egremont v. Date*, the other judges do not seem to concur in ; and if necessary to decide this point, I should be clearly of opinion that where the judge admits the evidence we could not interfere on behalf of the party to the action by granting a new trial. As to the next point, it is said to be a positive rule that the client must be

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called, because he may have repented of what he had said to his attorney before the trial. That would be very inconvenient. It may not be known for whom the attorney holds the deed, or he may hold it for several persons, and it would be impracticable to put the party to *subpoena* every person whose privilege might be set up. Here I think it is made out by the evidence that the attorney had received instructions from his client not to produce the deed, which is reasonable proof of the claim of the privilege. The wrongful refusal of a witness to produce a deed is not a ground for letting in secondary evidence. *Jesus College v. Gibbs*, 1 You. & C. 156.

Rule discharged.

FOSTER, officer, &c., v. THE MENTOR LIFE ASSURANCE COMPANY.¹

January 30, 1854.

Insurance — Re-assurance — Signature of Declaration — Parol Evidence to explain written Document — Usage, Admissibility of — Estoppel by Acquiescence.

The plaintiffs (the B. insurance company) re-assured, with the defendants, (another insurance company,) the life of D., which they had themselves previously assured to a larger amount. When the proposition to re-assure was made, the defendants sent to the plaintiffs a printed form containing nineteen questions relative to the age, health, and habits, &c., of the person whose life was to be re-assured; and a declaration to be made by him, that he was then in good health, and not afflicted with any disease tending to shorten life, and also, by the plaintiffs' agreeing that if any untrue statements were contained in such declaration or the answers to the questions, the assurance should be void. When this document was sent by the defendants, they had filled up the answers to the first five questions, but the rest were included in a brace, against which was written, "for these particulars see copies of B papers attached." At the foot of these words the plaintiffs' agent had signed his name. Neither the plaintiffs nor D. had signed the printed paper in any other part, and blanks were left for the signatures to the declaration. This document was returned to the defendants with copies attached of the papers delivered to the B. office on the original assurance, which were properly signed by D., the answers to which were admitted to be true when given. The defendants signed the policy, which recited that the plaintiffs had delivered to the defendants a declaration signed by them, setting forth the past and present state of health of the person whose life was assured, and stated that such declaration was to be the basis of the contract, and if any thing untrue were averred in it, the policy was to be void. The plaintiffs accepted this policy, and paid the premiums upon it. At the time when this re-assurance was effected, D. was living abroad, and was afflicted with a mortal disease, of which he soon afterwards died; but this fact was unknown to the plaintiffs or the defendants. An action being brought on the policy, (which was set out in the declaration,) the defendants pleaded that the plaintiffs untruly stated, in the declaration mentioned in the policy, that D. was, at the time of making it, in good health, and issue was taken on this plea. At the trial, evidence was given of the facts above stated. The defendants applied for a nonsuit on the ground that the plaintiffs, by their agents, must be taken to have signed the declaration on which the policy was founded. The judge refused to nonsuit, and directed the jury to say whether the meaning of the parties was, that the plaintiffs undertook that D. was then in good health, or that the defendants were to decide whether they would re-assure upon the statements appearing in the original papers; and he handed to the jury the whole of the documents

¹ 23 Law J. Rep. (N. S.) Q. B. 145.

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in evidence, in order that they might form their opinion whether the signature applied to the declaration, or only to the particular questions against which it was placed: —

Held, by Lord Campbell, C. J., Coleridge, J., and Wightman, J., that the question whether the plaintiffs had signed the declaration, was for the jury, and not for the judge, to decide; but,

Per Erle, J., that the plaintiffs, suing on the policy, could not give parol evidence to contradict the statement contained in it.

Secondly, (by Wightman, J., and Erle, J.,) that the jury were misdirected in not being told that the plaintiffs, having accepted the policy containing the recital that they had signed the declaration without objection, were *prima facie* concluded by that recital.

Per Lord Campbell, C. J., and Coleridge, J., that the direction was right, as assuming that the plaintiffs had not signed the declaration, they were not under the circumstances precluded from denying that they had done so.

Evidence was given that it was usual where insurance offices re-assured lives, on which they had before granted policies, for the office proposing such re-assurance to submit to the office granting it the papers on which the original assurance was effected, and for the latter office to accept or decline such re-assurance on the statements contained in those papers: —

Held, by Lord Campbell, C. J., that the evidence of this usage was admissible to show that no declaration as to the present health of D. was signed by the plaintiffs — *dissentientibus* Coleridge, J., and Erle, J.

ACTION by the plaintiff, as one of the registered officers of the Britannia Life Association, upon a policy of assurance for the sum of 1,500*l.*, effected by the trustees of the Britannia Mutual Life Association with the defendants, on the life of Count D'Orsay.

The declaration set out the policy, which was dated the 10th of December, 1851, and recited that the trustees had caused to be delivered unto the office of the defendants a declaration or statement in writing, signed by them, bearing date the 21st of November then last, setting forth the age and the past and present state of health and other circumstances touching the habits of life of the said person on whose life the said assurance was to be effected; "and that it was provided by the policy that if any thing averred by the said trustees in the said alleged declaration was untrue, the said policy should be null and void." The declaration then contained a general averment that the said trustees did not declare to the defendants any thing that was untrue; and also stated that while the said policy was in full force the person upon whose life it was effected died, and that the defendants had not paid the amount assured.

Plea — That the said trustees and the said company did aver and declare to the defendants in the said policy, as agreed to be the basis of the said contract, something that was untrue; namely, that at the time of the delivery of the said declaration unto the office of the defendants the said Count D'Orsay was in a good state of health, and was not affected with any disease or disorder tending to shorten life; whereas, on the contrary thereof, the said Count D'Orsay was not then in a good state of health, but was then afflicted with a disease or disorder tending to shorten life.

The replication took issue on this plea.

At the trial, before Lord Campbell, C. J., at the sittings at Guildhall, after Trinity term, 1853, the following facts were proved in evidence: — On the 5th of August, 1845, the Britannia Mutual Life

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Assurance Association insured the life of Count D'Orsay for 4,500*l*. Upon this occasion the usual "proposal for assurance" was signed by Count D'Orsay and delivered to the Britannia office, stating the ordinary particulars as to his age (which was then forty-five,) health and habits. There was also a medical report from which it appeared that at that time Count D'Orsay's was apparently an excellent life.

In 1851 the Britannia Association altered their constitution, and determined to reduce the maximum of their assurances from 5,000*l*. to 3,000*l*., and accordingly they proposed to the defendants, the Mentor Life Assurance Company to reinsure the excess above 3,000*l*. insured upon five lives, including that of Count D'Orsay, these being the whole of the policies exceeding the limit of 3,000*l*. then existing in the Britannia office. This proposal for re-assurance was made and accepted upon the terms that all or none of the five lives were to be taken, one of them, that of the Duke of Beaufort, being admitted to be not insurable, but the four others being all believed to be good lives. One of the directors of the Britannia office stated to the defendants upon this occasion that Count D'Orsay's was a notoriously good life; and it was said that the proposal was accepted by the defendants on the faith of this statement. The premium upon the Duke of Beaufort's life was agreed to be at 20 per cent., the ordinary premium being paid in the other four cases. Count D'Orsay and one other of the persons whose lives were to be re-assured (Sir James Brooke) were living abroad at the time, and it was arranged between the offices that the Britannia office was not to furnish any evidence of the state of health of the parties whose lives were re-assured beyond what appeared by the papers delivered into their office when the assurances were originally effected (copies of which were to be handed over to the defendants,) or the defendants might procure by their own inquiries. Accordingly, on the 21st of November, 1851, the following printed proposal, which was previously filled up by a clerk of the defendants, with the exception of the plaintiffs' signature, was sent to the Britannia office.

MENTOR LIFE ASSURANCE COMPANY, 2 OLD BROAD STREET.

PROPOSAL FOR ASSURANCE.

Questions.	Answers.
1.— Name, residence, and description of party proposing assurance.....	{ Trustees of the Britannia Life Assurance Company. Gaspard Gabriel Gillion Alfred Count D'Orsay.
2.— Name, profession, or occupation and residence of party whose life is to be assured.....	
3.— Amount and term of assurance, and according to which of the printed tables it is to be effected. If according to Table 1, whether the premium is to be payable annually, half-yearly, or quarterly	{ 1,500 <i>l</i> . Table I. Whole life.
4.— Place and date of birth, and evidence of age.....	{ Paris, 4th of February, 1801.
5.— Age next birthday	{ 51.

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- 6.— Whether married or single
7.— If had the small-pox or undergone vaccination
8.— If suffered from habitual cough, spitting of blood, asthma,
or any disease of chest or lungs.....
9.— If ever suffered from apoplexy, palsy, insanity, epileptic
or other fits, dropsy, rupture, gout, rheumatism, or any other
disease tending to shorten life.....
10.— Whether of sober and temperate habits.....
11.— Whether of active or sedentary habits.....
12.— Whether liable to any hereditary disease.....
13.— Whether employed in the naval or military service.....
14.— If resided abroad, state when, where, and how long.....
15.— If there be any circumstances connected with health, habits,
or otherwise calculated to render an assurance of life more
than usually hazardous.....
16.— Whether the party has ever made a proposal for assurance
at this or any other office; (if so, state at which office); and
what was the result of each such application
17.— The name and residence of the ordinary medical attend-
ant, and how long known to him. If the party cannot refer
to a medical man, the reason must be so stated in the answer;
and in that case, the party must refer to two private friends..
18.— If recently received advice from any other person or per-
sons, give the name and address of such
19.— The name and residence of an intimate friend, not being a
relative, or interested in the assurance, and how long known to
him

For these particulars, see copies of Britannia papers
attached.

E. R. FOSTER,
Resident Director.

21st of November, 1851.

DECLARATION.

I, *Count D'Orsay*,¹ above designed, do hereby declare that I am at present in a good state of health, and am not afflicted with any disease or disorder tending to shorten life; that the above statement of my age, health, and other particulars, is true; and that I have not withheld or concealed any circumstance tending to render an assurance on my life more than usually hazardous. And we, *The Trustees of the Britannia Life Assurance Company*, (the parties in whose favor this assurance is to be granted,) do hereby agree that this declaration shall be the basis of the contract between us and the Mentor Life Assurance Company; and that if any untrue averment is contained in this declaration, or in the answers above given, all sums which shall have been paid to the said company upon account of the assurance made in consequence thereof, shall be forfeited, and the assurance be absolutely null and void.

Signed at _____, this 21st day of November, 1851.

Signature of party whose life is to be assured _____

Signature of party in whose favor policy is to be granted _____

Witness _____

This declaration was not signed either by Count D'Orsay or by the trustees of the Britannia office. The plaintiff, on receiving the printed proposals, signed his name under the words, "For these particulars, see copies of Britannia papers attached," and returned the proposals to the Mentor office, with copies attached of all the papers signed by Count D'Orsay and the medical referees, which had been delivered to the Britannia office at the time when the original policy for 4,500*l.* was granted by them. The defendants, on receiving the

¹ The words in *Italic* were written — the rest of the declaration being a printed form.

above proposal filled up as above stated, forwarded to the Britannia office a policy in the following form : —

"Mentor Life Assurance Company.

"No. 442. Life of another.

"Sum assured, 1,500l. Premium, 62l. 2s. 6d., payable annually.

"Whereas W. B., &c., trustees of the Britannia Mutual Life Association, &c., the persons assured by this policy, are desirous of effecting an assurance with the Mentor Life Assurance Company upon the life of Gaspard Gabriel Gillion Alfred Count D'Orsay, in the sum of 1,500l., and the said assured have caused to be delivered unto the office of the said company a declaration or statement in writing, signed by them, bearing date the 21st day of November last, thereby setting forth the age and the past and present state of health and other circumstances touching the habits of life of the said person on whose life the assurance is effected; which declaration, so far as it respects the age of the said person, is hereby admitted to be correct; and the said assured have agreed that the said declaration or statement shall be the basis of the contract between them and the said company, &c. Now, therefore, this policy witnesseth, &c. Provided always, that if any thing averred by the said assured in the declaration hereinbefore mentioned to have been made by them is untrue, this policy shall be null and void, &c. In witness, &c."

[Signed by three directors of the Mentor Life Assurance Company.]

There was also an indorsement that the first year's premium had been duly paid. It was also proved that the Britannia office gave a check in one sum for the premiums payable upon all the five policies.

On the 4th of August, 1852, Count D'Orsay died, at Paris, of a mortal disease, under which he had been suffering on the 21st of November, 1851, but this fact was unknown to the trustees of the Britannia office or to the defendants. Evidence was given at the trial that it was not unusual for offices to re-assure lives assured with them, and that the ordinary course in such cases was, that the office proposing the re-assurance submitted to the other office all the papers originally signed by the party whose life was assured, for the particulars as to the state of health, habits, &c., and upon the statements in those papers the re-assurance was either accepted or declined. It, however, appeared that such re-assurances generally took place within thirty days of the original assurance, in which case they were considered as being simultaneous with it.

At the close of the case it was contended, on behalf of the defendants, that, upon the true construction of the proposal and policy, the Britannia Company had made a declaration, as the basis of the contract, that Count D'Orsay was, on the 21st of November, 1851, in good health and not afflicted with any disease tending to shorten life; which was, in fact, not true. The Lord Chief Justice, however, thought it was a question for the jury, as the policy and the declaration at the foot of the proposal varied in representing that the decla-

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ration was signed by the trustees of the Britannia office, and there was evidence of a custom as to what is usually done between companies upon a re-assurance; and he left it to them to say whether the declaration in the proposal, which was stated to be the basis of the contract, was meant by the parties, according to the custom of re-assuring lives between insurance offices, to be a declaration that at the time when the policy was effected, Count D'Orsay had not any disease tending to shorten life. If they were of opinion that the Britannia office entered into such an undertaking as in the case of an original assurance, they were to find for the defendants; but if they thought the intention was, that the Mentor office was to decide whether they would re-assure the life upon the statements appearing in the original papers, as there was no imputation of fraud, they ought to find for the plaintiff. He also told the jury that the declaration, purporting to be made by the trustees of the Britannia office, not being in fact signed by them, was evidence that the declaration was not intended to be the basis of the contract. The counsel for the defendants thereupon interposed, and suggested that the signature of the plaintiff across the printed proposal must be taken to be a signature of the declaration at the foot; to which the learned judge replied, that he did not think it could be so, as he had only signed, "for these particulars see copies of Britannia papers attached;" but he handed to the jury the whole of the documents, and directed them, upon an inspection of them and consideration of the evidence, to say whether the signature was understood between the parties to apply to the declaration or only to the particular questions in the proposal. The jury returned a verdict for the plaintiff, with 1,587*l.* damages, leave being reserved to the defendants to move to enter a nonsuit if the court should be of opinion that the question was one of law for the judge, and ought to have been decided by him in favor of the defendants.

A rule *nisi* having been accordingly obtained, and also for a new trial on the ground of misdirection; that the evidence of the custom as to re-assurance ought not to have been admitted; and also that the verdict was against the weight of evidence.

Willes showed cause.¹ First, it is said that this is a mere question of law, and that the Britannia office has, on the proper construction of these documents, warranted that at the time when the policy in question was effected, Count D'Orsay was not afflicted with any disease tending to shorten life. But that is not so, because before any construction can be put on these documents, a question of fact must be determined: what was the intention of the plaintiff in writing his name in the place where it appears in the printed proposals? The question, therefore, was one for the jury to decide, and it was properly left to them. It cannot be decided, as a pure matter of law, that this amounts to a signature of the declaration. The evi-

¹ Nov. 16. Before Lord CAMPBELL, C. J., COLERIDGE, WIGHTMAN, and ERLE, JJ.

dence of the surrounding circumstances and the usage which prevails in such cases of re-assurance are most important ingredients for the determination of this question. A custom of trade, if not inconsistent with a written contract, is admissible in evidence to explain it. *Wigglesworth v. Dallison*, 1 Dougl. 207. Here, there is an ambiguity caused by the blanks in the documents which may be removed by parol evidence. It may be said, that as the policy recites that the trustees of the Britannia office have signed a declaration setting forth the age and past and present state of health of Count D'Orsay, and they have agreed that such declaration shall be the basis of the contract, they cannot now deny that they have signed the declaration. But the policy is the language of the defendants, not of the Britannia office, and cannot, therefore, estop the latter. Besides, the recital in the policy is not binding, because it gives a false description, and *falsa demonstratio non nocet*. It is untrue that there was any statement made by the trustees as to the present state of health of Count D'Orsay. The evidence of the custom shows that the representation did not apply to the present state of health, and that the Britannia office did nothing more than hand over the papers originally delivered to them, which refer to the state of health at the time of the original assurance.

[ERLE, J. — The first five questions are answered by the plaintiff.] They are such as can be answered either directly or by mere computation from the papers in the Britannia office. There is no signature at all by Count D'Orsay, who was perfectly indifferent about, and probably ignorant of the whole transaction. This case is very like that of *Moore v. Garwood*, 4 Exch. Rep. 681; where it was held, in the Exchequer Chamber, that when the question of what the contract is, depends, not solely on a written document, but also upon matters of fact connected with it, it is for the jury and not for the judge. But upon the face of the printed proposals, if those are to be alone looked to, there is no declaration by the trustees that Count D'Orsay was *then* in good health.

[COLERIDGE, J. — If the state of health in 1845 was all that was intended to be stated, it would have been sufficient to hand over the old papers without making any fresh declaration or saying any thing in the policy about the *present* health.]

These policies and documents are framed according to a form generally used, being partly written and partly printed, and this form is not strictly applicable to a case of re-assurance. But the mode in which the questions are answered distinctly gives the defendants notice that the Britannia office does not intend to answer any questions as to health or habits otherwise than by handing over the information upon which they acted in 1845. It is, therefore, evident that they never intended to pledge their own knowledge or to give any warranty as to those questions.

Sir A. E. Cockburn, (Attorney-General,) and *C. Wood*, contra. — It is sought to be represented that the recitals in the policy granted by the defendants are false, and the plaintiffs are endeavoring to avail

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themselves of that representation. If such a course of proceeding be allowed, there will be no security in contracts of this nature. If the recitals were untrue, the plaintiffs ought, in the first instance, to have said so. The court, in support of the issue, must look at the declaration as the basis of the contract. There is nothing to show that it was repudiated by the directors of the Britannia Association. Every thing was filled in by the clerk of the Mentor Company, except the signature; and provided the signature is that of the director of the Britannia, the place of the signature is immaterial.

[LORD CAMPBELL, C. J. Is it not a question for the jury to decide to what the signature was placed?

ERLE, J. I think it is a question of law whether the director signed the whole or a part only of the written paper.]

The plaintiff was not asked, and could not properly be asked, whether it was his intention to sign a part only. The question, therefore, is a question of law. Evidence of custom, if there were any applicable to the circumstances, is not admissible in this case. The document here is distinct in terms as to the then present state of Count D'Orsay's health. The principle of *falsa demonstratio non nocet* cannot apply. The declaration incorporates in terms the former papers, and the question must be determined upon the documents themselves, and not upon any thing done by the parties. If there be any *falsa demonstratio* it must be in the documents themselves, and that is a question for the judge and not for the jury, and if so, there should have been either a nonsuit or a special verdict. But further, if it be a question for the jury whether this was a constructive signature of the whole, it has not been sufficiently left to the jury. The judge, in his summing up, assumed that it was not such a signature, and the jury found their verdict upon that assumption.

[ERLE, J. If the facts are admitted, then it is for the judge to say whether or not it is such a signature: but if the facts are disputed, then it is for the jury to decide upon the facts, and for the judge afterwards to say to what the signature applies.]

Here there were no facts in dispute. Nothing being struck out of the paper, it must be taken that the whole was signed, it being clear that the signature was attached after the whole had been filled in. *Saunderson v. Jackson*, 2 Bos. & P. 238.

Cur. adv. vult.

The judges differing in opinion, now delivered judgment *seriatim*.

WIGHTMAN, J. This was an action by the plaintiff (representing the Britannia Life Assurance Company) against the defendants upon a policy of assurance upon the life of Count D'Orsay. The declaration was in the usual form, reciting the policy, and that the trustees of the assured had caused to be delivered into the office of the defendants a declaration in writing, *signed by them*, setting forth the age and past and *present* state of health, and other circumstances touching the habits of life of the person on whose life the assurance was to be effected; and that if any thing averred by the said trustees

in the said declaration, was untrue, the policy should be null and void. It was then averred that the said trustees did not in any manner declare to the defendants in any declaration in writing or otherwise any thing that was untrue. The defendants pleaded that the trustees did declare to the defendants, in the declaration mentioned in the policy, something that was untrue, that is to say, that at the time of delivering the said declaration into the office of the defendants, the said Count D'Orsay was in a good state of health; and issue was taken upon the allegations in the plea. There was no doubt but that at the time the declaration was delivered at the defendants' office, Count D'Orsay was *not* in good health, but was affected by the disease of which he died soon after. And the only question at the trial was, whether the trustees, in the declaration mentioned in the policy, represented Count D'Orsay to be *then* in a state of good health, that is, at the time of delivering the declaration to the office of the defendants. It appeared by the evidence at the trial, that the declaration referred to in the policy, was not in fact signed by the trustees, but by the plaintiff, who was the resident director of the Britannia Company. It was, however, hardly disputed but that Foster was the agent of the trustees for the purpose of the declaration, and that what he did and signed upon that occasion bound the Britannia Company and the trustees as fully as if they had acted and signed themselves. Assuming, then, that the signature of Foster pledged the company as completely as if the trustees had themselves signed the declaration, the question is, what did Foster sign, and to what did he pledge the trustees and the Britannia Company? The document which is called a declaration is in two parts: the first being a series of nineteen questions to be answered by the persons to be assured; and the second a declaration to be made by the person whose life is to be assured, that he is, at the time of making the declaration, in a good state of health, with a further declaration by the parties to be insured, that if the preceding declaration or their answers to the questions be untrue, the insurance will be void. Both parts of the document are on the same side of one sheet of paper. The assurance proposed to be effected by the Britannia Company with the defendants was, in fact, a re-assurance, the Britannia Company having, in 1845, granted a policy of assurance upon the life of Count D'Orsay to a larger amount than that which they proposed to assure with the defendants. When the proposition to assure was made, the defendants sent to the Britannia Company the document in question, partially filled up by themselves; they had from their own knowledge given the answers to the first five questions, but the twelve following questions were included in a brace, against which was written at the side of the paper, "For these particulars, see copies of Britannia paper attached;" and at the foot of these words the plaintiff Foster signed his name, but nowhere else. The blank left for the signature of the person whose life is to be insured to the declaration to be made by him was not filled up, nor was it signed by Count D'Orsay; nor was the blank left for the signature of the party to be assured, vouching for the truth of the declaration and of

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the answers to the questions, filled up, but remained in blank as sent by the defendants to the plaintiffs' office. The real question upon the issue was, whether the Britannia Company had, in the document referred to in the policy, represented Count D'Orsay as being in good health at the time of delivering that document to the defendants. But to determine this question, it seems to have been considered necessary to determine a previous one, namely, whether the party signing the document intended his signature to be to the whole or only to the part against which it was placed, and this was the question in substance which was left to the jury; and the point now to be determined by us is, whether in our opinion there was any misdirection in the manner in which that question was left to the jury, or in the leaving it to them at all. The defendants, by the recital in the policy, show that they considered that the trustees, by the signature of Foster in the place where it was in the document, did make a declaration as to the then existing state of health of Count D'Orsay; and as the Britannia Company accepted the policy, with that recital in it, without denial or explanation of it, and the action is brought upon the very instrument containing the recital, one question, and that a most important one in this case, is, whether they are not bound by it, and concluded from denying now that they did make a declaration of the then present state of Count D'Orsay's health.

The document referred to, if the signature is to be taken as applicable to the whole, is not incapable of such a meaning; and, if it may be so construed, and the Britannia Company have, by allowing the defendants to deal with them as if it was to be so construed, assented to such a construction, and by means of it have obtained that which the defendants might not otherwise have been disposed to give them, it appears to me, upon the principle of the decision of *Pickard v. Sears*, 6 Ad. & E. 469, and some later cases founded upon it, that the Britannia Company are *prima facie* concluded, and cannot be allowed now to deny that they did mean the declaration to apply to the existing state of Count D'Orsay's health, or that the signature by Foster applied to the whole document. But though, in some sense, the Britannia Company may be said to be concluded by the recital, it is not an estoppel, nor a conclusion in point of law; it may have been founded on mistake, or be capable of explanation, and I do not think that there is enough to warrant a rule absolute for a nonsuit; but it appears to me that the circumstance of the Britannia Company having accepted the policy with that recital was not sufficiently, if at all, pressed upon the attention of the jury, and that upon that ground, and without reference to the other points taken upon the motion for the rule, there should be a rule absolute for a new trial.

ERLE, J. Assuming the pleadings and evidences to be as stated by my brother Wightman, I have come to the conclusion, that the plaintiff's case failed at the trial on several grounds. As he sues upon a written contract, he is a party to it as much as if he had signed it, and cannot by parol evidence contradict or alter the stipu-

lations therein. In that written contract, namely, the policy, it is stipulated that the plaintiff had delivered unto the defendants a declaration in writing setting forth (*inter alia*) the present state of Count D'Orsay's health, and that if the declaration was untrue the promise of the defendants was void. The parol evidence was offered to show that the plaintiff had not delivered unto the defendants any such declaration in writing so setting forth the present state of the health of Count D'Orsay. It seems to me that the attempt was thereby to contradict the written agreement, and to alter the promise of the defendants from conditional to absolute. The question of signing is only material to identify the alleged declaration; when the paper containing it was identified, the question of signature was not of the essence of the stipulation, but the question of such a declaration so setting forth the present state of Count D'Orsay, was material and could not be denied by the plaintiff. If the stipulations are changed into the form of an executory agreement, the declaration might run thus, "in consideration that the plaintiff would deliver such a declaration and would undertake it was true, and would pay the premium, the defendants promised to insure." The plaintiff could not recover on such a contract without averring that he had delivered such a declaration and that it was true, and if the stipulations of the deed are analyzed, the delivery of such a declaration will appear to be equally indispensable for the plaintiff; and if he delivered none such, the defendants' promise did not attach, and the plaintiff would fail.

Supposing this ground not to be tenable, I am further of opinion that the plaintiff was concluded from setting up at the trial that he had not made such a declaration. The defendants sent to the plaintiff for signature such a declaration so setting forth the state of Count D'Orsay's health, and received it back with a signature at the side; and the defendants recited in their contract that the plaintiff had delivered in such a declaration, and that they acted on the fact so recited, and they promised only on condition it was true; the plaintiff, by accepting that promise, induced the defendants to act on the belief that the declaration had been so delivered in as recited, and the plaintiff obtained the deed by reason of that belief. Then, in claiming a benefit under that deed, he is concluded from denying the fact, which the defendants informed him was the basis of their promise. The case of *Pickard v. Sears* and many cases founded thereon have carried the doctrine much further than is required for the purpose of the present defendants. The effect of the words "concluded from denying" has never been settled: perhaps the effect is, that the principle ought to be explained to the jury, and they should be told, as matter of law, that as against the party who authorized the belief they are bound by law to find the fact to be as the opponent under the supposed circumstances believed, and if they found otherwise, to set aside the verdict. But whatever be the correct mode of acting upon that principle, it was not brought forward at all on the trial.

I would further observe that the evidence of other contracts made by other offices was inadmissible, as irrelevant, towards proving the meaning of the contract made between these parties. The contracts

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which other offices have made are no evidence against the Mentor to prove this contract. If it be admitted, none would seem to be at all applicable, except re-assurances after an equal interval from the original assurance, as of course the probability of an alteration in the risk and the need of a fresh declaration is in direct proportion to the length of that interval. Of such re-assurance there was to my mind very little satisfactory evidence. After the course pursued at the trial, I am not prepared to say that a nonsuit should be entered now, though it appears to me that the only two questions for the jury must be answered for the defendants, and the construction of the written instruments must be in the defendants' favor. But I am of opinion that the verdict for the plaintiff ought not to stand, and that, therefore, the rule for a new trial should be absolute.

COLERIDGE, J. In this case three points are made for the defendants: first, that they were entitled to enter a nonsuit; secondly, that the jury were misdirected; and, thirdly, that the verdict for the plaintiff is contrary to, or against the weight of evidence. It is necessary, with a view to the decision on each of these points, to look to the declaration and issue, as well as the evidence in the cause. It is an action by the trustees of the Britannia Mutual Life Association against the Mentor Life Assurance Company, to recover upon a policy effected by the former with the latter on the life of Count D'Orsay. In the declaration, stating that such policy had been effected, the plaintiff states that it was therein recited that they had caused to be delivered into the defendants' office a declaration or statement in writing signed by them, bearing date the 21st of November then last, setting forth the age and the past and present state of the Count and other circumstances touching his habits of life, and that they had agreed that the said declaration or statement should be the basis of the contract between them. The declaration also sets out a provision in the policy, that if any thing averred by the trustees in the alleged declaration so recited and alleged to have been made by them was untrue, the policy shall be null and void. The declaration also contains an averment that the said trustees did not, nor did the said Britannia Mutual Assurance Association aver or declare to the defendants any thing that was untrue in any declaration in writing or otherwise howsoever. The defendants plead that the trustees and the association did aver and declare to the defendants in the said declaration mentioned in the said policy as agreed to be the basis of the said contract something that was untrue, that is to say, that at the time of the delivery of the said declaration into the office of the defendants, the said Count D'Orsay was in a good state of health, and was not afflicted with any disease or disorder tending to shorten life, whereas he was not then in a good state of health, but was then afflicted with a disease and disorder tending to shorten life. The plaintiff takes issue on the whole plea. Three questions are involved in this issue. Did the trustees deliver a signed declaration? Did that declaration state Count D'Orsay to be at the time of such delivery in a good state of health, free from any disorder

tending to shorten life? If such declaration was delivered containing such statement, was that statement true? and it is not denied that it was, in fact, untrue. So that the substantial questions for determination at the trial were reduced to the first two.

Upon the trial, it appeared that the policy in question was one of re-assurance, effected in December 1851, for 1,500*l*; the original policy, for a larger amount, having been effected in 1845; that this was one of five policies of re-assurance offered to the defendants together, all or none to be accepted, on five several lives. Some parol information was given as to each, and the Count's was represented as a notoriously first-class life. It was shown that the defendants had given to the plaintiff a paper, headed on the upper part, "Proposal for assurance," in the lower, but on the same side, "Declaration." The part headed "Proposal" contained nineteen questions, with blank spaces left for the answers. These questions were the ordinary ones as to the age, condition, health past and present, the having or not having had certain specified disorders, the habits and medical attendant of the life to be insured, the having or not received recently advice from any other person, and required the name and residence of some intimate friend. To the first five questions, which had no reference to health, or habits, or medical advisers, specific answers were given on the paper; all the succeeding questions, excepting the last as to the intimate friend, appeared to have been inclosed within a bracing line, and across the blank space opposite them was written "For these particulars, see copies of Britannia papers attached," and under this came the signature of the plaintiff, "E. R. Foster, resident director, the 21st of November, 1851." No answer was given to the 19th question. Under the part headed "Declaration," came first, a statement with a blank, which was filled up in writing with the words "Count D'Orsay," and which purported to be a declaration by him that he was then in a good state of health, and was not then afflicted with any disease or disorder tending to shorten life; that the above statement of his age, health, and other particulars was true; and that he had not withheld or concealed any circumstance tending to render an assurance on his life more than usually hazardous; secondly, followed, "and we, the trustees of the Britannia Life Assurance Company agree that this declaration shall be the basis of the contract between us and the Mentor Life Assurance Company, and that if any untrue averment be contained in this declaration, or in the answer above given, the assurance shall be absolutely null and void." Then came the words, "Signed at this 21st Nov. 1851.

"Signature of party whose life is to be assured.

"Signature of party in whose favor policy to be granted.

"Witness

None of these blanks were filled up. The defendants contend that this paper, upon admission of the plaintiff's handwriting, and of its delivery to the defendants, presented no question except for the Judge, and that he was bound so to construe it that a nonsuit thereon ought to have been entered or a verdict for the defendants, upon these

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grounds substantially, that it being immaterial on what part of the paper the party to be charged by it signs his name, the plaintiff's signature must be taken conclusively to apply to the whole paper; and that the reference to the Britannia papers attached did not import that they were to be looked to only to ascertain what the state of Count D'Orsay's health and habits were in 1845, when they had been given, but brought down those answers to the then present time.

Now, as to the first of these points, I apprehend it cannot be laid down simply and without qualification, that it is immaterial in what part of a paper you find the signature of the party to be bound by it; it is rather true to say, that if you find it at the foot of the matter written, it is to be taken conclusively to apply to the whole, unless there be something expressly to rebut that presumption; and that if you find it anywhere else, it may apply to the whole, if upon the evidence you find that the party signing so intended. Where the intention to sign is found, and the signature is so placed as apparently to apply no more to one part than another, there can be no reason *prima facie* to consider it otherwise than as intended to apply to the whole; but where the contents of the paper are divisible, and the signature is placed under or opposite one portion only, the question whether it applies to all or only to that one portion, is still purely one of intention. Now, wherever that question arises, it must be for the jury. These principles I think may be collected from the decisions on the Statute of Frauds both as to wills and contracts. Thus, in *Right v. Price*, Doug. 229, where a testator had signed the first two sheets of his will, and attempted to sign the third, but from weakness could not do it, this was held no execution. Lord Mansfield said, "when he signed the first two sheets, he had an intention of signing the other, but was not able; he therefore did not mean the signature of the first two as the signature of the whole." But in *Winsor v. Pratt*, 2 B. & B. 650, where a will on one sheet concluded by stating that the testator had signed his name to the first two sides, and put his hand and seal to the last side, and he did put his name and seal to the third side at the end of the will, but did not sign his name to the first two sides, the Court supporting the execution, recognized the preceding case, and distinguished it. There, said Dallas, C. J., the intention of the testator was defeated by incapacity; here, the act of the testator points to nothing prospective; and whatever might have been his intention at one time of signing the former sides, he has by his final signature abandoned that intention. Again, in *Johnson v. Dodgson*, 2 Mee. & W. 653; the defendant, being the buyer of hops, wrote in his own book a sold note, beginning "Sold John Dodgson," and this, at his request, the seller's traveller signed. In an action for goods sold and delivered this was held a good signature by the party charged; Lord Abinger, C. B., saying, "The cases have decided that, although the signature be in the beginning or the middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury, whether the party, not having signed it regularly at the foot, meant to be bound

by it as it stood, or whether it was left so unsigned because he refused to complete it." The cases in which a printed name has been held a good signing are to be supported on the same principle, and the intention is to be inferred from the habit or from other circumstances to be found in them. If, then, this was a question of intention, and there was any evidence of intention, the learned Judge could not properly withdraw it from the jury; and it seems to me that there was such evidence in the circumstances of the whole transaction. For this was not an ordinary case, five lives were offered in the lump: one was confessedly a bad life; with regard to three some special information was offered; and as to one of them, Sir James Brooke, his absence at a great distance precluded the ordinary references. As to the life in question, he was honestly represented as so notoriously good a life, that the ordinary inquiries may well have been deemed unnecessary; he, too, was abroad, and it was probable he would not have troubled himself to answer questions, having no interest in the policy being effected. Altogether, it was a case of circumstances from which a jury was to determine whether there was an intention by the signature, found where it appeared on the paper, to sign and be bound by the whole instrument. In the light in which I view the case, as standing on its own peculiar circumstances, I do not rely on the evidence of usage. It seems to me rather that it was not one on which the evidence was admissible, and the evidence in fact admitted appears to me to have amounted to nothing of any substance. But this is not material upon the present rule, the first ground for which I think fails for the reasons given.

Secondly, as to the direction. Supposing the question of signature to have been for the jury. I do not see how it could have been properly left to them, except as one of intention to be collected from the paper itself, and all the circumstances stated by the witnesses; and this I understand to have been in substance what was done at the trial. It is not inconsistent with this that a question of construction as to part may have been mixed up, as to which the Judge was to give his opinion; and if he gave the jury what appears to us a wrong opinion, that might amount to a misdirection. On more grounds than one, it was certainly important for the jury to know what was the meaning of the answer to the questions included within the brace. Did it relate to the Count D'Orsay's state in 1845 or in 1851? Undoubtedly the words may admit of either interpretation. The learned Judge thought that the former was the true one, and after much consideration and some doubts, I am not prepared to say that he was wrong. It is impossible, I apprehend, to form an opinion upon this without reference to the circumstances under which the words were used, and these do not lead me to believe that the plaintiff intended to warrant a continuance at the date of this policy of all those particulars stated in the answers of 1845, but only that the particulars were true at the time when they were stated. Upon the general question, whether the whole paper was signed, it was objected that the learned Judge spoke too decidedly. Seeing nothing wrong in the opinion he expressed, that would be no objec-

tion with me, unless he thereby took the matter out of the hands of the jury; but, according to the notes, that cannot be said; he gave his opinion, but put all the facts before them for their consideration.

It only remains upon this point to consider, whether the circumstances precluded the plaintiff from denying a signature of the whole paper in the sense contended for by the defendants; if they did, the direction was not right. I am clearly of opinion they did not, and this must follow from the conclusions to which I have already come. The argument for the defendants on this point is to this effect: the policy on which the plaintiff's claim rests, recites that the plaintiff has caused to be delivered to the defendants a declaration in writing, signed by them, setting forth the past and *present* state of health, and other circumstances touching the habits of life of the Count D'Orsay. These words are the words of the defendants, but they show their understanding of the transaction. The plaintiff allows them to use them; and on the faith of this the defendants enter into the contract. The plaintiff, therefore, cannot now deny that such declaration was made. I should be very sorry to do any thing that should break in upon the wholesome principle laid down in *Pickard v. Sears*, but it seems to me that it would be going much beyond that principle, if we were to apply it to the facts of this case. What are they? I must now assume that no such declaration was in fact made, and that the plaintiff's proposal for insurance has been accepted on the faith of a different declaration, limited in its extent and not signed at all; that this fact is known to the defendants as well as to the plaintiff; and this being so, that the defendants, in the printed part of a policy using the ordinary words of such policy, knowingly, or with means of knowledge, misrecite the plaintiff's declaration, which misrecital the plaintiff passes over, accepts the policy so worded, and pays the premium. I am not supposing that the binding parts of a policy are to have less effect when printed than when written; but in applying a principle the foundation of which is natural equity, all the facts of the case are to be looked to, and this is one of them. Now, upon these facts, it seems to me that it would be unjust and unreasonable absolutely to conclude the plaintiff from denying the truth of this recital: it would be applying a principle framed to advance the ends of justice in exactly the opposite direction. The permitting the misrecital to pass without objection, is an argument fairly to be used for the defendants against the plaintiff's construction, but it is no more, and, in my opinion, not strong enough to weigh down the opposing argument. Upon the remaining question, the propriety of the verdict, I need say nothing in addition to what I have already said on the former points; from this it follows that at least I cannot consider the verdict one which the Court should interpose to set aside. I think, therefore, the rule ought to be discharged.

LORD CAMPBELL, C. J. I am of opinion that this rule for entering a nonsuit ought to be discharged. The issue was, "whether the plaintiff's company did aver and declare to the defendants in the

declaration mentioned in the policy, that at the time of the delivering of the said declaration into the office of the defendants, Count D'Orsay was in a good state of health, and not affected with any disease likely to shorten life." The fact was admitted that, unknown to both parties, Count D'Orsay when the policy was executed was affected by a disease likely to shorten life; and the verdict depended upon the proof of the alleged guaranty that he was then in good health.

I conceive that the defendants were bound to produce the document referred to in the recital of the policy, and to show that by this document the Britannia Company did give the alleged warranty. If this had depended upon the mere construction of the document, it would have been a pure question of law, and the judge, upon its being produced and proved, ought to have directed how the verdict should be found, or that the plaintiff should be nonsuited; but looking at the document, a question of fact arises, whether that part of it which is supposed to contain the guaranty is to be considered as signed by the assured. I cannot think that the recital by the defendants in the policy, that it was so signed, is binding on the assured. Suppose that no signature had appeared upon any part of it, and that it had been a mere printed form with none of the blanks filled up, surely the plaintiff would not have been precluded from contending that it was not signed, or from showing that the defendants had agreed to take upon themselves the risk of Count D'Orsay continuing an insurable life. It seems to me, that the doctrine of estoppel does not apply to such a transaction, and that we are bound to see whether, in truth, the declaration was signed by the directors, and what it imports. Looking to the document itself, in the place for "signature of the party whose life is to be assured," no signature appears, and in the place for "signature of party in whose favor policy is to be granted," no signature appears. In another part of the document there is the signature of one of the directors; but I think it impossible to say, as a matter of law, that this signature applies to that part of the document which contains the unsigned declaration in the name of Count D'Orsay. If it had been a question for the judge, I should certainly have said, that Foster's signature did not apply to this, and that the document as it stands would have no more effect than if that part of it entitled "declaration" had had none of the blanks in the printed form filled up in writing, or if this part of the document had been entirely wanting. From the place where Foster's signature is found, and the brace line denoting to what it does apply, with the words above the signature, "For these particulars, see copies of Britannia papers attached," I should infer that the proposed guaranty as to the present state of health of Count D'Orsay was repudiated by the Britannia Company, and that the directors of the Mentor Company, after having examined the papers showing Count D'Orsay's state of health when the original policy was effected, were left to draw their own conclusions as to his present state of health, and to take the risk of the Count's health continuing good down to the date of the new insurance. Considering the doubt as to whether the declaration be

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signed, as the defendants allege, I likewise think that some regard may be paid to the evidence of usage upon a re-assurance. This was not objected to at *Nisi Prius*, nor upon the motion for a new trial, and if admitted, the jury were to determine what effect it was entitled to. An observation has been made, that the evidence was only parol, and that the policies referred to by the witnesses were not produced. But it has often been held, that although the contents of a particular document cannot be proved without its being produced or accounted for, a mercantile usage which refers to written documents may be established by parol evidence; and, indeed, it could hardly be proved satisfactorily in any other way. Moreover, I conceive that the evidence given, on both sides, of the conversations and conduct of the parties while the transaction was going forward might be taken into consideration in determining whether the declaration was intended to be, and was understood between the parties to have been signed by Foster. If there was any parol evidence on which the issue was to depend, then, according to the well-known rule clearly stated by Patteson, J., in delivering the judgment of the Exchequer Chamber, in *Moore v. Garwood*, the whole was for the jury. I do not know any principle or practice according to which, in this case, the signature of the declaration should have been left to the jury as a separate issue. No question arose or could arise for the judge upon the construction of the declaration, for if it was signed by the trustees of the Britannia, it amounted, and was admitted to amount, to an express warranty in the very words of the plea, that Count D'Orsay was, on the 21st of November, 1851, in good health, and was not then afflicted with any disease tending to shorten life. The doctrine of *Pickard v. Sears* and *Freeman v. Cooke*, 2 Exch. Rep. 654, which we have lately had to consider in *Howard v. Hudson*, 2 El. & Bl. 1, s. c. 20 Eng. Rep. 47, would have effectually estopped the Britannia Company from denying that they had given the warranty, if they had stated that they had signed the declaration, for then they would have made a statement on which the Mentor Company had acted, and thereby incurred a liability to their prejudice. But if the declaration was repudiated, instead of being signed, there had been no statement by the Britannia Company which could be the foundation of such an estoppel; for the recital in the policy is a statement by the Mentor Company only, and if the declaration was not signed by the directors of the Britannia Company, nor understood so to be, the Mentor Company cannot have acted upon any such belief. Indeed, they knew full well that Count D'Orsay was then abroad, and that there never was any contemplation of his signature being affixed to it, and this was a preliminary to the signature by the party in whose favor the policy was granted. At the trial the defendants attempted to prove that they granted the policy on the credit of a parol declaration by one of the Britannia directors, that "Count D'Orsay was a notoriously good life." I am, therefore, of opinion that the issue resolved itself into a question of fact for the jury, and that we cannot direct a nonsuit to be entered, according to the leave reserved, if the court should think that the judge ought to have directed a nonsuit at the trial.

It is next contended, that there was misdirection in the manner of leaving it to the jury, chiefly on the ground that the judge used the expression, that "the declaration was not signed by the trustees." But, in using that expression he only gave the jury to understand that no signature was found where it ought regularly to have appeared; and when the attorney-general interposed during the summing up, suggesting that the writing of Mr. Foster across the document must be taken to be a signature of the declaration, the judge, according to the short-hand writer's notes, observed, "I do not think so, because Mr. Foster has only signed 'For these particulars, see copies of Britannia papers attached;' but the jury shall see the whole." Accordingly, *fac simile* copies of the whole paper entitled "Proposal for Insurance," were put into the hands of the jury, and their attention was directed to the different parts of it, so that they might form a proper opinion whether the signature was intended and understood between the parties to apply only to a part or to the whole. The signature, therefore, was left with the other facts in the case for their consideration. Nor was any question of law left to the jury which the judge ought to have determined, for they were not called upon to construe a written document, or to pronounce upon the intention of the parties from the language used. If it be alleged that the supposed estoppel or conclusive admission ought to have been submitted to the jury, I answer that no such point was made at the trial; and that if it had, I think it could not be supported. The ground of misdirection, therefore, seems to me to fail.

The remaining question for our consideration is, whether the verdict was contrary to the evidence? In my opinion it was entirely according to the evidence and according to the justice of the case. All imputation of fraud was disclaimed by the defendants; and looking both to the written documents and parol evidence, I think the defendants, as far as the policies on Count D'Orsay and three others were concerned, were content to take these lives on the papers on which the former policies upon them had been effected, at the ordinary premium according to the ages which they had respectively attained, with that on the Duke of Beaufort's life at the extraordinary premium of 20% per cent., receiving in one check for 649%. 10s. 10d. the premiums on all the five for the first year, and being satisfied to run the risk of any of the four lives having become less eligible, than when the original policies were effected, by circumstances unknown to either party. If the defendants had expected the warranty, one would have imagined that they would have objected to the declaration when it was returned unsigned, and would have required it to be signed, as upon an original insurance, before they executed the policy. The mere circumstance of their having used the printed form of policy adapted to an original policy, with the printed recital that the declaration had been signed by the assured, is not at all sufficient to induce me to infer that they believed they had obtained a warranty such as would have been given by regularly signing such declarations as those upon which the original policies had been effected. In construing a policy of insurance, the court certainly cannot consider whether it be in

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writing or in print, or partly in writing and partly in print; but I think that the jury, in determining the fact whether the declaration was understood between the parties to be signed according to the recital, would have been perfectly justified in taking into consideration that this policy was in a printed form adapted to an original insurance and not to a re-assurance. Upon the whole, I am of opinion that a special jury of the city of London, — gentlemen more familiarly acquainted with such transactions than we are, — have arrived at a right conclusion, and that their verdict ought not to be disturbed.

Rule discharged.

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January 14, 1854.

Nuisance — Adjoining Occupiers — Sewer rightfully constructed — Liability to subsequent Tenant — Wrongful Continuance.

The defendant had, more than twenty years before the action, constructed a sewer or watercourse through property of his own, and then occupied by him. In 1845, the defendant let a house, shop, and cellar to the plaintiff, which the defendant down to that time also occupied with the property. In 1851, the sewer or watercourse burst, and thereby the plaintiff's cellar and goods were damaged; and the plaintiff thereupon brought an action against the defendant for negligently and improperly making and constructing the sewer, and keeping and continuing the same negligently and improperly made and constructed, and so causing the damage. The jury found that the sewer was not originally constructed with proper care, and it was proved that it had been continued in the same state: —

Held, that upon the letting of the premises to the plaintiff, a duty arose on the part of the defendant to take care that that which was before rightful, did not become wrongful to the plaintiff, because that would be in derogation of the defendant's own demise to the plaintiff; and that upon this ground, as also upon the principle *sic utere tuo ut alienum non laedas*, the action was maintainable.

THE first count in the declaration stated that the plaintiff was possessed of a certain house and shop, with a certain cellar under the same and thereto belonging, in which said house, shop, and cellar the plaintiff then carried on his trade and business of grocer; that the defendant had, for his own accommodation and convenience, made and constructed, and at the time of, &c., kept and continued so made and constructed, a certain sewer or watercourse in and under a certain street or highway near to the house, shop, and cellar of the plaintiff, and which said sewer or watercourse was under the management and control of the defendant, and into which said sewer or watercourse he, the defendant, from time to time, caused and permitted large quantities of water to flow, which said water then flowed and passed in and along the said sewer or watercourse and near to the

¹ 23 Law J. Rep. (N. S.) Q. B. 163; 18 Jur. 332.

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said cellar of the plaintiff, of which the defendant before and at the time of the committing of the said grievances had notice; yet the defendant, not regarding his duty in that behalf, so negligently, insufficiently and improperly made and constructed the said sewer or watercourse, and at the time, &c., kept and continued the same so negligently, insufficiently, and improperly made and constructed, and in such an insufficient and improper state, and did also at the said time so negligently and improperly manage the said sewer or watercourse, and cause and permit such large and unreasonable quantities of water to flow into the same, that on the 5th of February, 1851, divers large quantities of water penetrated and burst through and flowed out of and from the said sewer or watercourse of the defendant into the said cellar of the plaintiff, and then greatly damaged and injured the same; and also then damaged and destroyed divers large quantities of groceries and other goods of the plaintiff then lawfully being in the said cellar in the way of the plaintiff's said trade and business.

There was a second count for damage alleged to have been done on the 4th of February, 1852.

Plea. Not guilty.

On the trial, before Erle, J., at the last summer assizes at Liverpool, it was admitted by the defendant, that the sewer or watercourse was made and constructed by him under a street or highway more than twenty years ago, for his own accommodation and convenience; and also that the said sewer or watercourse was kept and continued so made and constructed by the defendant for his own accommodation and convenience until the summer of the year 1852, when part of the same was altered by the defendant at his own costs and charges. By this sewer the water which before had run unconfined was collected and conveyed away past the premises occupied by the plaintiff. In 1845 the defendant, who at that time occupied as well as owned all the adjoining premises, let the house, shop, and cellar to the plaintiff. It was contended, for the defendant, that he having given no undertaking respecting the sewer, there was no obligation thrown on him to make any alteration so as to cure any defect in it, or effectively to secure it. The learned judge was of opinion that it was a continuing duty in the defendant to keep a sewer, which bordered upon the property let by him, constructed with reasonable care and skill so as not to burst; and he directed the jury that if they were of opinion that the sewer was not constructed with proper care and skill considering the works which were near it, and the flow of water to come down, and the various drains which entered into it, the plaintiff was entitled to compensation; but if they thought that it was, it was then a question for the court, whether the defendant was liable as an insurer of the sewer. The jury found that it was not constructed with proper care and skill, and a verdict was taken for the plaintiff, the damages to be certified by an arbitrator.

In the following term a rule *nisi* was obtained for a new trial on the ground of misdirection.

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H. Hill and *J. A. Russell*, showed cause. The defendant is guilty of keeping and continuing the sewer so as to damage the plaintiff. The defendant kept the sewer in the state in which it was originally constructed, and the direction to the jury was perfectly right. The argument on the other side is, that the plaintiff took the premises subject to the risk from the sewer, and could not therefore maintain an action for an injury occasioned by its improper construction. But that in point of law is not so. A person who becomes a tenant is a purchaser *pro tanto*, and so far has the right of a vendee. That which is laid down by Lord Holt, in *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1092, 1093, is in point here. He says, "If a man has two houses contiguous; and one has a house of office which is separated from the cellar of the other by the wall which traps in the filth of the house of office, and he sells that house, the vendee must keep in the filth of the house of office as it shall not run in upon the other house. . . And it would have been all one if the vendor had sold the house with the cellar, then he must have kept the wall of the house of office so as to have kept the filth in, for every man must take care to do his neighbor no damage." The principle that a man shall not be allowed to derogate from his own grant applies here; and so also the case is within the maxim, that a man must so use his own property as not to injure another. *Vaughan v. Menlove*, 3 Bing. N. C. 468; *Cooper v. Barber*, 3 Taunt. 99.

Knowles and *Holland*, in support of the rule. The defendant was guilty of no wrongful act in making the sewer, and cannot therefore be said to have continued a nuisance. The jury should only have been directed to consider the question of negligence as regarded the management of the sewer after the plaintiff's possession. Whilst the whole property was in the defendant's possession, it became impressed with a particular quality, and the plaintiff must be considered as taking part of that property, subject to the same quality whether beneficial or burdensome. In *Gale on Easements*, 49, 2d ed., this mode of acquiring a right is called "disposition of the owner of two tenements;" that phrase being adopted as expressing the same origin of title as that in the French law, "Destination du père de famille." And at page 51, it is said, "Were the land benefited and the land burdened belonging to the same owner, he may change the qualities of its several parts at his will, and his express volition, evidenced by his acts, is as effectual to impress a new quality upon his inheritance as the implied consent arising from his long-continued acquiescence. If, when the wrongful act complained of took place, the plaintiff's premises had been held by a stranger and the defendant afterwards purchased them, the wrongful act would be purged, and the plaintiff becoming lessee could not maintain an action." *Robins v. Barnes*, Hob. 131. Here, if any wrongful act had been committed after the plaintiff's entry, the defendant might have been liable for that, but that is not the case here. To ascertain the rights and duties arising out of the maxim, "*Sic utere tuo ut alienum non lædas*," the state of the property at the time when the right of the neighbor to the adjoin-

ing property first accrued, and the mode of user with reference to that state of the property, must be considered. *Rich v. Basterfield*, 4 Com. B. Rep. 783. When damage is done by that which is not a nuisance when first made, a party complaining cannot look back to the original construction, but must look to the user at the time and the mode of user. A tenant is not bound to put a house into better repair than it was in when he became tenant, and a landlord is not bound to alter a sewer from the state it was in when the tenant took the premises. They referred to *Arden v. Pullen*, 10 Mee. & W. 321.

LORD CAMPBELL, C. J. I am of opinion that the rule should be discharged. Mr. Knowles's reasoning would have been conclusive, if the sewer had not been badly constructed at first; but here the whole point turns upon the defective construction of the sewer. Though it was no nuisance so long as all the property remained in the possession of the defendant, when he let the house to the plaintiff a duty arose on the part of the defendant, which required him to take care that that which was before rightful should not be so continued as to become wrongful, because it was in derogation of his own demise of part of the property to the plaintiff. The admission that the defendant maintained the sewer in a defective state, admits a wrong by which his neighbor was injured. The authority of Lord Holt is express to show that on selling part of the property a new duty arose, and the case put by him applies by way of illustration to this case. Though both premises were formerly in the same hands, it cannot be said that a new quality was impressed on the part alienated, which continued after the separation.

CROMPTON, J.¹ I am of the same opinion. This was an action for a nuisance in land, and the averment that the defendant kept and continued the sewer so improperly made and constructed is a proper mode of averring that the defendant did a continuous act. There is an express admission that the defendant kept and continued it in the same defective state in which it was originally made; that makes them *prima facie* liable. Then it is suggested, that there is an implied easement from the necessity of the case. If it were so, it should have been pleaded; but this could not be such an easement, nor is it within the class of cases called by Mr. Gale "disposition of the owner of two tenements." Suppose it was necessary to the enjoyment of the house that the sewer should pass through it, that would be in the nature of a grant of necessity, that is what is meant by Mr. Gale in the passage cited; but that is not like this case. Therefore, the direction to the jury was proper, and coupling that with the admission that the original construction was defective, the action is maintainable.

ERLE, J. I think the action is maintainable, founded on the rights and duties arising by reason of vicinage. The plaintiff and the defend-

¹ Coleridge, J., had left for chambers.

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ant are in the position of separate owners in this matter. The defendant had all the rights which a neighbor has, and there is a duty in every neighbor to take care that he shall not injure his neighbor's property. The maxim, "*Sic utere tuo ut alienum non lædas*," applies. The defendant constructed a sewer defectively, through his property, and near to the plaintiff's premises, and he had a right to do so; but he constructed it so as to bring water down it, and by reason of want of care in the construction the water got out, and injured the plaintiff's goods. The plaintiff has a right to prevent the water from being poured on his land. There is no ground for saying that the plaintiff came to the property knowing that there was a nuisance; in such a case it is a question for the jury whether the plaintiff assented to the nuisance or not.

Rule discharged.

THE GOVERNORS OF THE RUSSELL INSTITUTION, appellants; and THE VESTRYMEN OF THE JOINT PARISHES OF ST. GILES-IN-THE-FIELDS AND ST. GEORGE, BLOOMSBURY, respondents.¹

January 18, 1854.

Poor Rate — Russell Institution, Purposes of "Science, Literature, or the Fine Arts" — Reading-Room for Newspapers, Periodicals, &c. — Annual Voluntary Contribution.

The Russell Institution comprises a library, theatre or lecture-room, and a news-room, and was founded in 1808 for the purposes of, first, the formation of a library consisting of the most useful works in ancient and modern literature; secondly, the establishment of a reading-room provided with the best foreign and English journals and other periodical publications; thirdly, for lectures on literary and scientific subjects. The funds for purchasing the building and supporting the institution were raised in the first instance by transferable shares. Persons might become annual subscribers to the institution and be entitled to the privileges of proprietors. There were about 400 shareholders and subscribers and the privileges of the institution, except as to admission to the lectures, were confined to them. The library contained about 18,000 volumes and the principal reviews, magazines, daily and weekly papers, and other periodicals, and directories and other books of reference, and the mining and railway journals and railway time-tables. Some of the newspapers taken in were filed, and the rest sold for the benefit of the institution. The lectures on subjects connected with science, literature and the arts, the public were invited to attend upon payment of an admission fee. The whole income of the institution, derived in part from the rent of baths, wine-cellars and annual subscriptions, was applied in defraying the expenses of the institution, and a rule of the institution provided that no dividend, gift, division or bonus in money or otherwise could be made to or between the members:—

Held, that the institution could not be considered as "a society instituted for the purposes of science, literature, or the fine arts exclusively," and was therefore liable to parochial rates.

Quære. Whether it could be considered as "a society supported in part by annual voluntary contributions," within the meaning of 6 & 7 Vict. c. 30, s. 1.

THIS was an appeal against a rate made for the relief of the poor, dated the 28th of October, 1852; and by consent of the parties, and an

¹ 23 Law J. Rep. (N. S.) M. C. 65; 18 Jur. 597.

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order of Erle, J., the following case was submitted for the opinion of this court, under the 12 & 13 Vict. c. 45.

The rate appealed against is a rate for the relief of the poor of the parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, in the county of Middlesex, jointly made by the vestrymen of the joint vestry of the said parishes, by virtue of an act passed in the 11th year of the reign of his late majesty King George the Fourth, c. 10, intituled "An Act for the better regulation of the affairs of the joint parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, in the same county," whereby it is enacted, that it should be lawful for the vestrymen of the said joint vestry from time to time, as often as occasion should require, to make one or more rate or rates (to become due and payable in such proportions and at such time or times as the persons making the same should direct) for defraying the expenses of relieving, maintaining, employing, and managing the poor of the said parishes jointly, and all other expenses connected therewith or relating thereto, upon the several tenants or occupiers of all lands, houses, buildings, tenements, and hereditaments within the said parishes or either of them, and that every such rate should be allowed and confirmed by two or more of his majesty's Justices of the Peace for the county of Middlesex. The rate in question was made on the 28th of October, 1852, and was on the same day duly allowed and confirmed. In and by this rate the governors of the Russell Institution are assessed as tenants or occupiers at the sum of 166*l.* as ratable value. The property in respect of which they are so assessed is called the Russell Institution, and is situate in Great Coram Street in the said parish of St. George, Bloomsbury, and comprises a library, a theatre or lecture-room, and a news-room, occupied by them for the purposes of such institution, and a residence for the librarian, having a separate entrance, but under the same roof and communicating with the other parts of the building. The building also comprises some baths and wine-cellars, but these are distinct from the institution and are let off (the rents forming part of the income of the institution) and the tenants are separately assessed in the said rate. The premises are held for the residue of a long term of years at a small ground-rent.

The notice of the grounds of appeal against this assessment given by the above appellants stated in substance, that by virtue of an act passed in the 6th and 7th years of her present majesty, intituled "An act to exempt from county, borough, parochical, and other local rates, land and buildings occupied by scientific or literary societies," the appellants are not liable to be assessed to the said rate in respect of the part of the building so occupied by them; the barrister referred to in the said act having certified that this society, known as the Russell Institution, is entitled to the benefit of the said act, and that the said rate ought to be altered or amended by assessing the appellants at the sum of 25*l.* only as heretofore, for the part of the said building which is occupied by the librarian as his residence.

This society was instituted in the year 1808, and its objects are stated in the original prospectus from which the following are extracts.

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The objects of the institution are the gradual formation of a library, consisting of the most useful works in ancient and modern literature, including in the latter foreign as well as English. The establishment of a reading-room, provided with the best foreign and English journals and other periodical publications deserving of attention and encouragement, and an institution for lectures on literary and scientific subjects. The utility of lectures is sufficiently obvious. The design of those to be delivered at this institution will be to afford useful instruction rather than popular entertainment. All that is proposed to be done at the outset is to provide an apartment suitable for the purpose. It will be matter for subsequent consideration whether the success of the establishment will justify the assignment of regular stipends to the lecturers, and whether such a measure will be necessary; but it is proposed that persons desirous of taking advantage of the lectures and not being proprietors, shall, for each course pay a distinct subscription, the amount of which may be regulated by the committee in conjunction with the lecturer. The building was not erected by the society, but was purchased by them of the builder, and the cost thereof with the fittings was 9,000*l.* or thereabouts, which, with the funds for supporting the institution, was raised by shares of twenty-five guineas each, and is now the property of the present holders of such shares. Some shares have become forfeited, and from time to time have been resold for the benefit of the institution. The shares are transferrable, and the present price is much below the original subscription. Persons who are not shareholders may and do become annual subscribers, and by reason of their subscriptions are personally entitled to all the same privileges as proprietors. The members of the institution and the subscribers at the present time amount to about 400, and the privilege of resorting to and using the establishment is confined to them, excepting as to the admission to lectures, as hereinafter mentioned. The library contains about 18,000 volumes of works in every department of literature and science, for the use of the proprietors and subscribers. The principal reviews, magazines, and other periodicals are taken in, together with books of reference, directories, the mining and railway journals and railway time-tables, but no business of any kind is transacted on the premises. The news-room is supplied with twenty-four daily and some of the weekly newspapers. Some are filed, the others are sold at a reduced price for the benefit of the institution. Lectures are delivered during the season on various subjects connected with science, literature, and the arts, and the public are invited to attend them by advertisement in the newspapers. Some of the lecturers lecture gratuitously and others are paid out of the funds of the institution; persons who are not proprietors pay for their admission.

In 1851 and 1852 several *soirées*, or evening meetings, were held. At these meetings paintings, pieces of sculpture, new inventions in the useful arts and interesting objects in natural history were exhibited, and tea and coffee were provided. Tickets entitling persons to admission on those occasions, were issued to proprietors only, who were responsible for the price of such tickets. Proprietors were themselves admitted free, other persons by means of the tickets so sold;

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the produce of such sale, after defraying the expenses of the *soirées*, was applied in aid of the funds of the institution. Many literary and scientific persons attended by invitation. Besides the building the institution is possessed of 4,000*l.* in the public funds, purchased with part of the moneys originally subscribed, the dividends on which form part of the income. The society is supported in part by the rents of the baths and wine-cellars, and by the dividends of stock, and in part by the annual contributions of the proprietors and subscribers, as after mentioned. The rules provide that each proprietor shall pay an annual subscription of one guinea; persons not being proprietors who are admitted as annual subscribers pay two guineas each per annum. The whole income is applied in defraying the expense of repairs of the building and the other expenses of the institution, and by the present rules no dividend, gift, division, or bonus in money or otherwise can be made unto or between any of the members; this rule was instituted in 1847 for one by which a dividend was divisible amongst the proprietors in certain events. Till after the passing of the act, 6 & 7 Vict. c. 34, the whole of the premises were rated under one assessment. In 1847 the society submitted its rules to the barrister pursuant to the said act, and by his certificate, dated the 28th of June, 1847, he certified that this society was entitled to the benefit of that act, and the society accordingly claimed to be exempted pursuant to the said act. In December, 1847, a ratepayer, on behalf of the parish, appealed to the Quarter Sessions against the said certificate of the barrister, and upon the hearing of the appeal the said certificate was quashed, and the society was rated without allowing any exemption down to the year 1849. In the year 1849, the society again submitted their rules, with some alterations, to the barrister, who gave his certificate, dated the 2d of August, 1849, that this society is entitled to the benefit of the said act. Thereupon, in 1849, the society appealed to the vestry against the then rate, claiming exemption pursuant to the said act. This appeal was allowed by the vestry, and thenceforth the vestry rated the said governors at 25*l.* for the part occupied as a residence by the librarian only. The society continued to have the benefit of the said exemption down to the 28th of October, 1852, the date of the rate now appealed against. The appellants and respondents are mutually agreeable that the only issue intended to be raised is, whether the Russell Institution is a society within the meaning of the said act, 6 & 7 Vict. c. 36, and as such entitled to the exemption claimed. The existing rules of the society have been duly certified, and filed with the clerk of the peace. Copies of the above rules accompany this case and are to be taken as part thereof, and may be referred to by the court or either party on the argument of this case.

If the court should be of opinion that the appellants were liable to be rated in respect of the whole of the said property, then the said rate was to be confirmed; but if the court should be of the contrary opinion, then the said rate was to be amended by striking out the sum inserted as "rateable value" in the said assessment on the appellants, and by inserting in lieu thereof the sum of 25*l.* as "rateable

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value," and by altering the sum inserted as "amount of rate" from 8*l.* 19*s.* 10*d.* to 1*l.* 7*s.* 1*d.*, or in such other way as the court should direct; the parties agreeing that a judgment in conformity with the decision of this court, and for such costs as this court shall adjudge, should be entered on motion by either party at the General Quarter Sessions of the Peace for the county of Middlesex, next or next but one after the decision should have been given.

Bodkin argued in support of the rate, and referred to *The Queen v. Brandt*, 20 Law J. Rep. (N. S.) M. C. 119; s. c. 3 Eng. Rep. 323, and *The Queen v. Gaskill*, 16 Q. B. Rep. 472; s. c. 8 Eng. Rep. 298.

Pashley, contra, referred to *The Churchwardens and Overseers of Birmingham v. Shaw*, 10 Q. B. Rep. 868; *The Queen v. Jones*, 8 Ibid. 719; and *The Earl of Clarendon v. The Rector, &c., of St. James's, Westminster*, 10 Com. B. Rep. 806; s. c. 5 Eng. Rep. 393.

The judgment of the court (Lord Campbell, C. J., and Erle, J., — the other judges were sitting in the Court of Criminal Appeal,) was now delivered by —

LORD CAMPBELL, C. J. In this case the question submitted to us is, "whether the Russell Institution is a society within the meaning of the 6 & 7 Vict. c. 36, so as to be entitled to exemption from parochial rates." The property in respect of which the appellants are assessed to the relief of the poor is situate in the parish of St. George, Bloomsbury, and comprises a library, a theatre or lecture-room, and a news-room, occupied by them for the purposes of the institution. This society was founded in the year 1808, for the following objects, as stated in the original prospectus:—1. "The formation of a library, consisting of the most useful works in ancient and modern literature." 2. "The establishment of a reading-room, provided with the best foreign and English journals and other periodical publications." 3. "For lectures on literary and scientific subjects." The funds for purchasing the building and supporting the institution were raised by shares of twenty-five guineas each. The shares are transferable. Persons who are not shareholders may, and do, become annual subscribers, and by reason of their subscriptions are personally entitled to the privileges of proprietors. The members of the institution and the annual subscribers at the present time amount to about 400. The privilege of resorting to and using the establishment is confined to them, except as to the admission to lectures. The library consists of about 18,000 volumes, for the use of the proprietors and subscribers. The principal reviews, magazines and other periodicals are taken in, together with books of reference, directories, the mining and railway journals, and railway time-tables. Of the twenty-four daily newspapers and the weekly newspapers so taken in, some are filed and the rest are sold at a reduced price for the benefit of the institution. Lectures are delivered during the season on various subjects connected with science, literature, and the arts. The public are

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invited to attend them by advertisement in the newspapers, and are admitted on paying for their admission. The society is possessed, besides the building, of 4,000*l.* in the public funds, and is supported in part by the rents of the baths and wine-cellars. The rules provide that each proprietor shall pay an annual subscription of one guinea. Persons not being proprietors admitted as annual subscribers pay two guineas each per annum. The whole income of the society is applied in defraying the expense of repairs of the building and other expenses of the institution; and, by a rule made in 1847, doing away with the right which the proprietors before had to a dividend, it was declared "that no dividend, gift, division, or bonus in money or otherwise can be made unto or between any of the members." There has been a certificate, under the act referred to, that the society is entitled to the benefit of this act. We are of opinion, however, that we ought to give judgment for the respondents. It is unnecessary to decide whether this be "a society supported in part by annual voluntary *contributions*," within the meaning of the act. There may be ground for contending that *contribution* here does not mean a voluntary annual subscription or *payment* of money for value received or expected to be received by the party paying, but means a gift made from disinterested motives for the benefit of others, as it is used in the translation of St. Paul's Epistle to the Romans: "It has pleased them of Macedonia to make a certain *contribution* for the poor saints." The legislature may have intended to throw an additional burden on the other rate-payers of the parish by exempting from ratability property before ratable, only where it is occupied for the purposes of a society supported in part by charitable donations and not by payments made with a view to the personal accommodation and advantage of the members, although the object of their pursuits may be the cultivation of science, literature, or the fine arts.

According to this construction of the statute, where the society is instituted for the purposes of science, literature, or the fine arts exclusively, it would still be necessary to inquire whether the annual voluntary contributions by which the society is supported wholly or in part are or are not merely the purchase-money for benefits to which the contributors thereby entitle themselves. But we are of opinion, that the Russell Institution is not "a society instituted for the purposes of science, literature, or the fine arts exclusively." One of the purposes was "the establishment of a reading-room." Now, this was not a room in which the members and subscribers might read books taken from the shelves of the library, but where they might read twenty-four daily newspapers, the directories, and the railway time-tables. In such publications, besides interesting political, commercial, and fashionable intelligence for gratifying curiosity, there may often be found valuable essays on science and literature, and able criticisms to improve the taste of the reader in the fine arts. But news must be considered their chief staple, and from the statement in the case respecting this room, the great object of its establishment seems to be to give the members the amplest means for learning and discussing the news of the day. The ob-

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ject may be very laudable; but we cannot think that the members while so employed can fairly be considered as cultivating science, literature, or the fine arts. We think that the present case cannot be distinguished from *The Queen v. Gaskill*, where there being a society with a library and a news-room, supported by annual voluntary subscriptions, the court, (including Mr. Justice Patteson,) held clearly that it was not entitled to the exemption. There it is stated that the lectures are delivered in the season to members, strangers who choose to pay being admitted; but this cannot impress upon the institution the exclusive character of being devoted to science, literature, and the fine arts. The Russell Institution flourished before claiming the exemption, and we hope that, notwithstanding this decision, it will long continue to flourish.

Judgment for the respondents.

PENNELL and others v. ALEXANDER and another.¹

January 31, 1854.

Vendor and Purchaser — Construction of Contract — Principal and Agent — Stoppage in Transitu — Bankruptcy — Action by Assignees.

A. & Co., merchants at Londonderry, had instructed their correspondent, S. A., a merchant in London, to purchase corn on their account. S. A. purchased a cargo of Indian corn, and sent a contract note to the vendors, R. & Co., which stated that the cargo was "sold by order and for account of R. & Co. to our principals, shipped per *Cleopatra*, at the price of 24s. 6d. per quarter." The entry of the sale in the books of R. & Co. made S. A. "debtor to the cargo of Indian corn;" and they sent to S. A., the charter-party, the bill of lading duly indorsed, an invoice, and an order directing the captain to act upon the instructions of S. A. In the invoice S. A. was made the purchaser of the cargo. On the day of the purchase S. A. wrote to A. & Co., advising them of "having purchased for your account the cargo at 24s. 9d.," and inclosing the bill of lading and other documents received from R. & Co., and also S. A.'s draft for 1,525l. 16s. 3d. at three months, and an invoice signed by S. A., and stating that the cargo was "bought by order and for account and risk of A. & Co.," at 24s. 9d. per quarter. S. A. afterwards wrote requesting the draft to be made payable at a banker's, as it "facilitates our discounting the bill." The draft was returned to S. A. accepted. S. A., before the bill was due, became bankrupt, and R. & Co. thereupon stopped the cargo *in transitu*, not having received payment for it "on account (as they stated) of the bankruptcy of the cargo buyer." A. & Co. then wrote to R. & Co., stating that S. A., "from whom we bought the cargo," had informed them of its being stopped, and stating that they would then take up their acceptance, upon the cargo being allowed to proceed. A. & Co. afterwards paid to R. & Co. the amount of the cargo (1,472l. 3s.) as invoiced by R. & Co. to S. A. upon being indemnified by R. & Co., and the cargo was allowed to proceed as ordered by A. & Co. : —

Held, in an action by the assignees of S. A. to recover the amount of A. & Co.'s acceptance, that the documents in this case showed that S. A. was the purchaser of the corn from R. & Co., and the seller of it to A. & Co., and not merely an agent; that, therefore, R. & Co. had not at the time the right of stoppage *in transitu*; and that the assignees were entitled to recover in the action.

¹ 23 Law J. Rep. (N. S.) Q. B. 171; 18 Jur. 627.

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THIS was an action upon a bill of exchange for 1,525*l.* 16*s.* 3*d.*, drawn by S. Ashlin upon and accepted by the defendants. The plaintiff also sought to recover the same sum for goods bargained and sold, and sold and delivered, and on an account stated. The defendants pleaded, amongst other pleas, that before such bill of exchange was accepted and delivered by the defendants to the said S. Ashlin, the said S. Ashlin had been and was employed as the factor and agent of the defendants for the purchase of corn; and the said S. Ashlin, as such agent, had then purchased of one A. Ralli a cargo of Bulgarian Indian corn for and on account of the defendants. And the defendants further say, that the said S. Ashlin drew and the defendants accepted the said bill, and then delivered the same to the said S. Ashlin for and on account and in payment of the said Indian corn on behalf of the defendants; that the said S. Ashlin did not indorse or deliver the said bill to the said A. Ralli, or pay over the proceeds thereof to the said A. Ralli for the said corn, but kept and retained the said bill in his, the said S. Ashlin's, own possession at the time of his bankruptcy; that there never was at any time any value or consideration for their, the defendants', acceptance of the said bill except as aforesaid; that the said A. Ralli afterwards, and before this action, required the said defendants to pay him, the said A. Ralli, for the said cargo of Bulgarian Indian corn so purchased by the said S. Ashlin as aforesaid, and the defendants and A. Ralli agreed that the defendants should pay A. Ralli for the corn, which they did; and that the defendants did not pay the bill, and that the bill should be delivered up to the defendants.

The cause came on to be tried, before the Lord Chief Justice, at the sittings in London after Hilary term, 1853, when a verdict was found for the plaintiffs for the damages in the declaration and costs of suit, subject to the opinion of the court upon the following case.

The plaintiffs in this action are the assignees of the estate and effects of Spencer Ashlin, who was duly adjudicated and declared a bankrupt on the 15th of November, 1851. He stopped payment on the 13th of September, 1851. The defendants for some years last past have been residing and carrying on business as merchants at Londonderry, in Ireland; Antonio Ralli, hereafter referred to, has for some years last past been residing and carrying on business as a corn and general merchant in London, under the firm of A. Ralli & Co. The first transaction of A. Ralli with the bankrupt was in August, 1850, and was similar to the transaction hereinafter mentioned, as to the cargo of the *Cleopatra*; and after that time there were many other precisely similar transactions, amounting in the whole to upwards of 30,000*l.* In every instance entries were made in A. Ralli's books similar to the invoice of the 3d of September, 1851, first hereinafter mentioned. A. Ralli was paid by the bankrupt shortly after the respective transactions, according to the credit given, except in certain cases in which the bankrupt paid prior to the expiration of credit, taking interest for the unexpired period of credit. Previous to the transaction as to the *Cleopatra's* cargo the bankrupt had only

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one transaction with the defendants. On the 25th of August, 1851, the defendants wrote to the bankrupt the following letter: "Your esteemed favor of the 23d to hand, and are obliged by your offer of Indian corn, to be held on joint accounts. We have no objection to any transaction in the usual way of charging our commission on the sales, but we have never yet sold corn or any other produce without being paid for it. We find we can generally manage to find a good commission when selling on our own account. We shall be happy to do business with your house during the season, and will occasionally give you an order." On the 27th of August, 1851, the bankrupt wrote to the defendants the following letter: "Your esteemed favor of the 25th inst. is to hand, and contents duly received. We shall be glad to do business with you on the same principles as an opportunity may offer, and on your favoring us with an order, we dare say should be able at once to influence a cargo to your care for sale." On the 28th of August, 1851, the defendants wrote to the bankrupt the following letter: "You may take for us two cargoes of Ibraila corn, 1,000 to 1,500 quarters, at 24s. or 24s. 3d. per imperial quarter, bills of lading dated in July or August, payments by our acceptance at two or three months. One cargo of Ibraila at same price arrived or near at hand from 1,000 to 1,200 quarters, respectable shippers; for the latter we will remit cash. You may go to 24s. 6d. if you find you cannot do the work at 24s. or 24s. 3d." On the 30th of August, 1851, the bankrupt wrote to the defendants the following letter: "We have your favor of the 28th inst. and obliged by your orders; beg leave to inform you that we have taken for your account a cargo of Indian corn, per the Sultan, 529 kilos, nearly 1,200 quarters, from Ibraila, at 24s. 6d. per quarter, C. F. & I.; bill of lading dated the 30th of July. On Monday we shall wait upon you with documents and do what we can for you in further purchases." On the 1st of September, 1851, the bankrupt wrote and sent to the defendants the following letter: "We have your favor of the 30th ult. and take due notice of the contents, for which obliged. Herewith we beg to hand you documents and invoices per Sultana to your debit 938l. 13s., against which we have valued upon you from date of invoice, say the 29th of July, at three months' date, which balances the transaction, and we shall be obliged by your acceptance of our draft and returning the same to us. We have been unable to purchase any thing more to day in execution of your order, our market being stiffer for Ibraila corn, but you may rely on our best exertions." On the 3d of September, 1851, the following contract note was signed by the bankrupt and sent by him to Messrs. A. Ralli & Co:

London, September 3, 1851.

"Sold by order and for account of Messrs. Antonio Ralli & Co. to our principals, the cargo of Bulgarian Indian corn, fair average quality, shipped per Cleopatra, Capt. A. Saliaris, from Ghiacetti, consisting of 14,000 kilos, as per bill of lading, dated the 10th of July, 1851, at the price of 24s. 6d., say twenty-four shillings and

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sixpence per quarter, free on board at Ghiacetti, including freight and insurance, &c. Sellers to pay a commission of two per cent. Payment to be made in cash, less discount for the unexpired term of three months from the date of the bill of lading, in one week after receipt of documents and policies of insurance effected with approved underwriters, but for whose solvency sellers are not to be responsible, except the insurance is effected abroad, and in the latter case the loss or average, if any, is guaranteed to be adjusted and paid according to the custom and usance of Lloyd's."

This was a lithographed form which the bankrupt was in the habit of using. The cargo of the Cleopatra belonged to A. Ralli, and the following entry was made in A. Ralli's books respecting the said sale of the said corn, per Cleopatra:

"London, September 4, 1851.

"Messrs. S. Ashlin & Co., debtors to the cargo of L corn per Cleopatra." [Here followed the same as in the invoice after mentioned from the words "per Cleopatra."]

On the 3d of September, 1851, A. Ralli sent by letter to the bankrupt a letter of guarantee for the insurance, and an order for the captain to follow his instructions, the charter-party, the bill of lading duly indorsed by A. Ralli, and the invoice. [The invoice is set out in the judgment.]

The following is a copy of the above order to the captain:

"London, September 3, 1851.

"Captain Saliaris, of the Cleopatra, at Ghiacetti.

"Upon the receipt of this you will please follow the instructions of Messrs. S. Ashlin & Co., (or their agent,) respecting your port of discharge, receiving the amount of your freight from the consignees, and without further reference to ourselves. We are, &c., Yours, &c.

(Signed)

"A. Ralli & Co."

The following letter was written by the bankrupt to the defendants on the 3d of September, 1851:

"Your esteemed favor of the 1st inst. is duly to hand, and we now beg to advise having purchased for your account the cargo of Bulgarian Indian corn, per Cleopatra, at 24s. 9d. per quarter, C. F. & L., which is 3d. per quarter over your limit for Ibraila, but is proportionately cheaper. We, at the same time are able to inclose your documents, viz., bill of lading, charter-party, the order letter to the captain, letter of guarantee for the insurance, invoice amounting to 1,525l. 16s. 3d., and our draft for this sum at three months' date, which please return to us in due course of post, completed with your acceptance. A. Ralli & Co. is one of our best sellers."

In this letter were inclosed the shipping documents, bill of lading,

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and order to the captain, inclosed in the above letter from A. Ralli to the bankrupt, of the 3d of September, 1851.

The following is a copy of the bankrupt's draft above referred to : —

“London, September 3, 1851.

“ No. 822. — 1,525*l.* 16*s.* 3*d.*

“ Three months after date pay to our order fifteen hundred and twenty-five pounds, sixteen shilling and three pence, for value received in Indian corn, per Cleopatra.

(Signed)

“ Spencer Ashlin & Co.

“ To Messrs. J. R. & J. Alexander, Londonderry.

“ Payable in London.”

Across the draft was written, “Payable at office of drawers, London, J. R. & J. Alexander.”

This is the bill of exchange upon which this action is brought, and is accepted by the defendants.

The following is a copy of the invoice referred to in the said letter from the bankrupt to the defendants of the 3d of September, 1851:—

“ Invoice of a cargo of Bulgarian Indian corn shipped on board the Cleopatra, Capt. Saliaris, per bill of lading, dated the 10th of July, 1851, bought by order and for account and risk of Messrs. J. R. & J. Alexander.

“ 1851.				£	s.	d.
14,000 kilos — (816=100 quarters) —1,715½ quarters, at 24 <i>s.</i> 9 <i>d.</i>				2,123	1	9
Less Freight at 9 <i>s.</i> 3 <i>d.</i>	£793	9	6			
Gratuity	15	0	0			
	808	9	6			
Advance at Ghiacetti.....	200	0	0			
				608	9	6
				1,514	12	3
Difference 54 days' interest				11	4	0
				1,525	16	3

“ E. E. London, September 3, 1851.

(Signed)

“ Spencer Ashlin & Co.”

A letter was written and sent to the defendants by the bankrupt on the 5th of September 1851, requesting their draft against the Cleopatra to be made payable at a banker's “as this is sometimes looked to, and facilitates our discounting the bill.”

The following letter was sent on the 6th of September 1851, by the defendants to the bankrupt :—

“ Your esteemed favor of the 3d, and note-purchase of corn, per Cleopatra, at 24*s.* 9*d.* We would much rather have had Ibraila at 24*s.* or 24*s.* 3*d.* We inclose draft accepted, and as we have advice to-day of two cargoes of Ibraila bought for us by our Liverpool agent at 24*s.*, you need not operate further at present on our account till you hear from us.”

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The following letter was written by the bankrupt to the defendants:—

“ “

“ October 8, 1851.

“ We regret to find that the sellers of the Cleopatra's cargo of Indian corn, Messrs. Ralli & Co., stopped the cargo at Falmouth. We have just had an interview with their lawyer, Mr. Maynard, and Mr. Quilter, the accountant to our estate, who agree that the cargo should be allowed to go on provided you will discount your own acceptance for it, 1,525*l.* 16*s.* 3*d.* due on the 6th of December. It is the peculiar position of our estate that compels them to make this request. Now we should strongly recommend you to do this at once, as you may have great difficulty to get the cargo otherwise, and be ultimately compelled to pay your acceptance. We suggest that you should send the amount of the bill to your own agents to be paid on the bill being given up in exchange, and the cargo ordered on to Londonderry.”

The following letter was written by the defendants to A. Ralli:—

“ We are to-day in receipt of a letter from Spencer Ashlin & Co., from whom we bought the cargo of corn, per Cleopatra, saying that you had stopped the above cargo at Falmouth. We are rather surprised that you should have taken this step, which we are aware you have no right to do; but from the peculiar position of Messrs. Spencer Ashlin & Co.'s estate, we are inclined to waive our right and to meet your views by taking up our acceptance due on the 6th of December. If you wish us to do so please write us in course, and in the mean time you can allow the captain of the Cleopatra to proceed to this port.

(Signed)

“ J. R. & J. Alexander.”

On the 13th of October, 1851, A. Ralli wrote to Captain Saliaris, stating that he was not to follow the instructions of any one, but to wait till he received their further orders, “and that on account of the bankruptcy of your cargo-buyer with whom we are in negotiation.” On the 13th of October, 1851, A. Ralli wrote to the defendants that they were advised that they had a perfect right to stop the cargo of the Cleopatra *in transitu*, but in the event of the defendants desiring the vessel to proceed to this port, they would order the captain to do so, provided the defendants remitted to them the amount of the defendants' acceptance due on the 6th of December, then in the hands of Messrs. S. Ashlin & Co., who had stopped payment, and of which they were already aware; and they had neither handed over the said acceptance to them nor paid them the amount of the same, and consequently they had still a lien on the cargo. Ralli & Co. afterwards, in consideration of the defendants' paying the sum of 1,472*l.* 3*s.*, “being the amount to which the cargo was invoiced by them to S. Ashlin & Co., less the guarantee,” &c. agreed to allow the vessel with her cargo to proceed to her destined port, agreeably to the defendants' orders, and to indemnify

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defendants against all actions, suits, proceedings, claims, and demands which had been or might be brought by Messrs. S. Ashlin & Co., or their trustees or assignees, or any other person or persons whomsoever, under or by virtue of the said acceptance or in any other manner whatsoever in respect of or arising out of the original sale of the said cargo, or by the owners or captain of the *Cleopatra*, or by any other person or persons for demurrage or detention of the said vessel; and also from and against all loss and damage (if any) which had been or might be sustained by the cargo by reason of such detention. Upon being indemnified, the defendants paid A. Ralli 1,472*l.* 3*s.* The cargo of corn, per *Cleopatra*, was then delivered to the defendants in pursuance of orders from A. Ralli before the commencement of the action.

The question for the opinion of the court was, whether the plaintiffs were entitled to recover in this action, and the verdict was to be entered according to the direction of the court.

Bramwell (Jan. 24) argued on behalf of the plaintiffs, and referred to *Wilmshurst v. Bowker*, 2 M. & G. 792; *Lickbarrow v. Mason*, 1 Smith's L. C. 388; *Smyth v. Anderson*, 7 Com. B. Rep. 21; and *Poirier v. Morris*, 22 Law J. Rep. (N. S.) Q. B. 313; s. c. 20 Eng. Rep. 103.

Bovill, contra, referred to Story on Agency, section 420, 1st ed., *Ex parte Dumas*, 1 Atk. 232; *Scott v. Surman*, Willes, 400; Montague and Ayrton on Bankrupt Law, 853, 2d ed.; *Thomson v. Davenport*, 9 B. & C. 78; *Couturier v. Hastie*, 9 Exch. Rep. 110; s. c. 16 Eng. Rep. 562, in error, 20 Eng. Rep. 533.

Cur. adv. vult.

The judgment of the court¹ was now delivered by —

LORD CAMPBELL, C. J. We are of opinion that the plaintiffs are entitled to recover. If this decision operates as a hardship upon Antonio Ralli, who had indemnified the defendants, he has himself to blame for entries in his books and letters written by him, giving an untrue account of the transaction out of which the bill of exchange declared upon originated. The question is, whether we are to consider that the cargo of the *Cleopatra* was sold by him to the defendants through Ashlin as his agent, or that he sold the cargo to Ashlin, and that Ashlin resold it to the defendants. Upon the former supposition, the plea would be established, and the bill accepted by the defendants, for the cargo of the *Cleopatra* remaining in Ashlin's hands down to the time of his bankruptcy, the property in it would not vest in his assignees, as he held only as trustee for Ralli. Nor could the assignees recover the price of the corn as for goods sold and delivered. The plaintiffs indeed have said that as to the difference between the 24*s.*

¹ Lord CAMPBELL, C. J., COLERIDGE, J., and WIGHTMAN, J.

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6*d.*, and 24*s.* 9*d.* a quarter, this is an undefended action; but although Ralli might not be entitled to recover more than at the rate of 24*s.* 6*d.* if the corn never was the property of Ashlin, his assigns cannot sue for any part of the price of it; for the fraud which he perpetrated in charging the defendants a higher price than that at which he had purchased as their agent, could vest no right of action in his assignees.

On the other hand, if this was a sale by Ralli to Ashlin, and by Ashlin to the defendants, the fourth plea is not supported; there was no right to stop *in transitu* on Ashlin's insolvency after the resale and the bill of lading had been indorsed to the defendants; and the assignees are entitled to recover on the bill of exchange. In coming to the conclusion that this was a sale by Ralli to Ashlin, we wish it to be understood that in this case we attach no weight to the circumstance that the defendants resided at Londonderry, and for some purposes might be regarded as foreigners. We do not think that the class of cases headed by *Paterson v. Gandasequi*, 15 East, 62, have any application to such a dealing, and we should have arrived at the same conclusion had the defendants resided at Plymouth or Newcastle-upon-Tyne. We are influenced by the written documents evidencing the transaction, which, we think, satisfactorily show that Ralli treated Ashlin as the purchaser of the corn, and looked to him exclusively for payment. Ashlin was certainly supposed by Ralli to be selling the corn to a purchaser at the price for which Ralli was credited, Ashlin receiving no profit beyond a commission; and he made the defendants believe that he charged no more than the price at which he purchased in the market. But still he was considered by Ralli as the purchaser, and by the defendants as the vendor. Although the sold note in the lithographed form has the aspect of Ashlin being only a broker, by "our principals" Ralli seems to have understood Ashlin himself, for in his own books he immediately made an entry stating that Ashlin was indebted to him for the cargo of the *Cleopatra* in the common form as if Ashlin had been the purchaser, and along with the bill of lading and shipping documents connected with the cargo he sent to Ashlin an invoice, of which the following is a copy:—

London, September 3d, 1851.

"Messrs. Ashlin & Co.

Bought of A. Ralli & Co. the cargo of Indian corn, per *Cleopatra*, Captain Sallaris, à Ghiacetti, as per bill of lading, dated the 10th of July.

	£	s.	d.
14,000 kilos of Indian corn, at 816 kilos per 100 quarters, equal to 1,715½ quarters, at 24 <i>s.</i> 6 <i>d.</i> per quarter, C. F. & L.....	2,101	12	10

CHARGES.

	£	s.	d.
Freight on 1,715½ quarters, at 9 <i>s.</i> 8 <i>d.</i> per quarter.....	793	9	6
Gratuity.....	15	0	0
	808	9	6
Advanced to Captain à Ghiacetti.....	200	0	0
	608	9	6
	1,493	3	4
Commission 2 <i>l.</i> per cent.....	42	0	8
	1,451	2	8

E. E. A. R. & Co."

Regina v. The Overseers of East Dean.

Ashlin, in writing to the defendants and sending them the bill of lading and shipping documents, does state, and state falsely, that he had purchased the cargo of the *Cleopatra* on their account at 24s. 9d. per quarter; and his invoice, making the price to amount to 1,525l. 16s. 3d., he represents that the cargo was bought by order and for account of Alexander & Co.; but even then he acts as a principal, for he desires them to make the bill he drew against the cargo of the *Cleopatra* "payable at a banker's," as he says, "this is sometimes looked to, and facilitates our discounting the bill." Ralli's subsequent conduct and declarations clearly indicate that he had sold the cargo of the *Cleopatra* to Ashlin, for Ashlin had stopped payment while the *Cleopatra* with the cargo on board was at Falmouth on her way to Londonderry. Ralli stopped the cargo *in transitu* on the ground of the insolvency of Ashlin, whom he treated as the purchaser. The defendants in this stage of the transaction represent themselves as the purchasers from Ashlin, not from Ralli; for in a letter of the 11th of October, 1851, they say, "we held the bill of lading indorsed by Ralli & Co., but we understand they have some dispute with the original purchasers of the cargo." And in their letter of the same date to Ralli, they say, "We are to-day in receipt of a letter from Ashlin & Co., from whom we bought the cargo of corn per *Cleopatra*." They then go on to deny Ralli's right to stop *in transitu*, they having purchased from Ashlin. The subsequent arrangement between the defendants and Ralli, by which they were allowed to receive the cargo, paying him at the rate of 24s. 6d. per quarter, and he indemnifying them from their liability on the acceptance and against any demand of Ashlin or his assignees, could not prejudice the rights of the assignees if the cargo had been sold by Ralli to Ashlin. Upon the whole, we are of opinion that the defendants are liable in this action, and that Ralli paying the amount of the bill under his guarantee must be contented to take a dividend under the fiat against Ashlin, along with Ashlin's other creditors.

Judgment for the plaintiffs.

REGINA v. THE OVERSEERS OF EAST DEAN.¹

January 12, 1854.

Poor Law — Charges to Union Fund — Poor in Extra-Parochial District.

An extra-parochial place was, by the 5 & 6 Vict. c. 48, made liable to maintain its own poor, and afterwards comprised in W. union. Certain paupers had lived all their lives in that place, and, as far as was known, neither they nor their ancestors had any settlement elsewhere: —

¹ 22 Law Times Rep. 258.

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Held, that, as these paupers were irremovable, because there was no place to which they could be removed, and not by reason of the 9 & 10 Vict. c. 66, the charges of relief must be borne by the place itself, and was not cast on the common fund of the union, by the 11 & 12 Vict. c. 110, s. 3.

THIS was a rule *nisi* calling on the auditors and overseers of the poor of the township of East Dean to show cause why the allowance of the Poor Law Auditor of the sums of 2*l.* 8*s.* 9*d.*, 54*l.* 13*s.* 8*d.*, 5*s.* 6*d.*, and 13*l.* 11*s.* 7*d.*, charged in the accounts of the Westbury-on-Severn Union, Gloucestershire, to the common fund of the union, should not be quashed, and why the said sums should not be paid to the common fund of the union, by the township of East Dean in the said union.

The several sums of money had been expended in relief of paupers, under the following circumstances:—

Previously to 1842, the extra-parochial parts of the Forest of Dean were wholly exempted from the operation of the statutes for the relief of the poor, and no provision existed for the maintenance or settlement of the poor therein.

By the 5 & 6 Vict. c. 48, the extra-parochial parts of the Forest of Dean were divided into two townships, by the names of East and West Dean, and each township was thenceforth made liable to maintain its own poor, and placed on the same footing as other townships maintaining their own poor.

The township of East Dean was subsequently added to the Westbury-on-Severn Union, by the Poor Law Commissioners.

The paupers, to whom the relief objected to was given, were born in the extra-parochial part of the Forest of Dean, (now called East Dean,) and had never gained a settlement in that or any other township, parish, or place. They had lived there the whole of their lives, and, whilst so inhabiting, had become chargeable to, and been relieved by the township of East Dean, during the half year ending the 26th March last. There was no evidence, and it could not be ascertained that the paupers' parents who had lived in the same extra-parochial part of the forest, had any settlement in any place whatever.

One of the paupers, Eliza Tingle, was born a bastard in the same part of the forest, in 1832, and had lived there all her life.

The guardians of the parish of Westbury-on-Severn, at the audit of accounts of the Westbury-on-Severn Union, (15th June, 1853,) objected to the allowance of the above sums expended for the relief of the paupers, and charged to the common fund of the union; but the auditor allowed them, thinking them chargeable to the common fund of the union, by the 11 & 12 Vict. c. 110, s. 3, for the following reasons: For that the paupers, having resided in the said township of East Dean as aforesaid, more than five years before they were relieved, and not being settled in such township, were, in his judgment, irremovable by the 9 & 10 Vict. c. 66; and also for that it was not shown to him that the paupers had not respectively settlements, either acquired by themselves or derived by them in some other than the township of East Dean.

Regina v. The Overseers of East Dean.

Alexander and *Phipson* showed cause on the part of the auditors. These paupers were irremovable from the township of East Dean by the 9 & 10 Vict. c. 66, s. 1, having resided there for upwards of five years.

[LORD CAMPBELL, C. J. That statute contemplates some place to which the paupers could have been removed.]

Then the 11 & 12 Vict. c. 110, s. 3, enacts that the costs of relief of paupers who, not being settled in the parish where they reside, shall, by the 9 & 10 Vict. c. 66, be irremovable, shall be charged to the common fund of the union. It was not shown to the auditor that they had any other settlement.

R. Hale, *H. James* with him, showed cause on the part of the township of East Dean. There was no poor law in these extra-parochial parts before 1842, and the paupers had no settlement as such in East Dean. Then the bastard pauper had not gained a settlement anywhere else.

[LORD CAMPBELL, C. J. A pauper not settled somewhere is irremovable.]

As to the other paupers, the probability is that they had a settlement elsewhere, which was capable of being discovered.

Pashley and *Dodswell*, in support of the rule, were not called upon.

LORD CAMPBELL, C. J. This is an unjust attempt on the part of the township of East Dean to exempt themselves from a burden which they ought to bear; and they contend that the relief of all their poor, who have lived from their birth in the township, should now be cast on the common fund of the union. Unless it is shown that the paupers were rendered irremovable by the 9 & 10 Vict. c. 66, the expenses are not cast on the common fund of the union by the subsequent act. Now, it is clear that they were not rendered irremovable by the 9 & 10 Vict. c. 66; therefore there is no ground for saying that the expenses are cast on the common fund of the union.

COLERIDGE, J. The 9 & 10 Vict. c. 66, applies only to cases to which the poor law acts applied before that act, and must be restrained to cases within the reach of the poor law acts. Therefore the 11 & 12 Vict. c. 110, s. 3, does not apply to this case.

WIGHTMAN, J. The 11 & 12 Vict. c. 110, s. 3, is only applicable to cases within the 9 & 10 Vict. c. 66; and, to render that act applicable, there must be some place to which a pauper but for that act could have been removed.

Rule absolute.

Regina v. Bennett.

REGINA v. BENNETT & others.¹

January 25, 1854.

Order of Removal—Paupers having no Settlement—Charge on Common Fund of the Union.

The 9 & 10 Vict. c. 66, extends only to render irremovable such paupers as have a known settlement to which they would be liable to be removed independently of the provisions of that act; and the 11 & 12 Vict. c. 110, s. 3, casts upon the common fund of the union the cost of relief of such paupers only.

Therefore, where paupers who had resided for upwards of five years in a place which was formerly extra-parochial, but was in 1842 made a township by act of parliament, and included in an union, and had acquired no settlement in that township or elsewhere, became chargeable thereto, the cost of their relief was not properly charged on the common fund of the union.

THIS was a rule calling upon Edward Murrell, Esq., the auditor of the Gloucestershire and Monmouthshire Poor Law Audit District, and the overseers of the poor of the township of East Dean, in the Westbury-upon-Severn Union, in the county of Gloucester, to show cause why the allowance of the said auditor of the sums of 2*l.* 8*s.* 9*d.*, 54*l.* 13*s.* 8*d.*, 5*s.* 6*d.* and 13*l.* 11*s.* 7*d.*, charged in the accounts of the said union to the common fund of the said union (which allowance had been removed into this court by *certiorari*;) should not be quashed or disallowed; and why the said sums should not be paid to the said common fund by the said township of East Dean.

The following were the facts upon which this case was founded, as stated in the affidavits and return to the *certiorari*:—

At an audit of the accounts of the Westbury-upon-Severn Union, held, on the 15th of June, 1853, the auditor allowed the two following items of expenditure charged to the common fund of the said union:

Maintenance of paupers in the house	£ 68	8	10
Out relief	363	9	4½

The defendants objected to the allowance of the following items, being parcel of the said sum of 363*l.* 9*s.* 4½*d.*: namely, 2*l.* 8*s.* 9*d.* expended in the relief of one T. Dawe as an out-door pauper during the half-year ending the 25th of March last; 54*l.* 13*s.* 8½*d.* expended in the relief of several other persons as such out-door paupers during the same period; and 5*s.* 6*d.* expended in the relief of Eliza Tingle as such out-door pauper during the same period. They also objected to the allowance of 13*l.* 11*s.* 7½*d.*, part of the said sum of 68*l.* 8*s.* 10*d.* expended in the relief of the said Eliza Tingle and several others as in-door paupers of the said union.

Previously to the year 1842 the extra-parochial parts of the Forest of Dean were wholly exempted from the operation of the statutes for

¹ 23 Law J. Rep. (N. S.) M. C. 39; 18 Jur. 311.

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the relief of the poor, and no provision existed for the maintenance or settlement of the poor therein. By the 5 & 6 Vict. c. 48, the extra-parochial parts of the Forest of Dean were divided into two townships, by the names of East Dean and West Dean, and by section 2, of that statute, it was enacted, that each of the said townships should thenceforth maintain its own poor and be vested with the same powers, &c., and subject to the same laws, authorities, and regulations as other townships maintaining their own poor. Pursuant to this act, the Poor Law Commissioners, in 1843, added the township of East Dean to the Westbury-on-Severn Union. The said pauper T. Dawe was born in that extra-parochial part of the forest now called East Dean, in 1804, and lived there all his life; he never gained a settlement in that township, nor had he any known settlement elsewhere. While so inhabiting in the said township, he, together with his wife and family, became chargeable thereto, and were relieved with out-door relief during the half-year ending the 25th of March. His father and mother were inhabitants of and resided, so far as could be ascertained, in the same extra-parochial part of the said forest, and there was no evidence, nor could it be ascertained, that either of them, or any of their parents, had ever obtained or were entitled to any settlement in any parish or place whatsoever. The circumstances of the several persons in respect of whom the said sums of 54*l.* 13*s.* 8½*d.* and 13*l.* 11*s.* 7½*d.*, also objected to, had been expended, were similar in all respects to those of T. Dawe.

The said Eliza Tingle was born a bastard in the same extra-parochial part of the forest in 1832, and never gained a settlement in any other township, parish, or place. She lived and inhabited in the same part of the Forest of Dean the whole of her life, and whilst so inhabiting had become chargeable to and was relieved by the said township.

Under the above circumstances, the auditor allowed the said several sums, so objected to, to continue charged to the common fund of said union, and, having been requested to do so, entered in the book of accounts the following reason for the said allowance: "because the said T. Dawe and the said other poor persons having resided in the township of East Dean for more than five years before they were relieved as above mentioned, and not being settled in such township, were in my judgment irremovable therefrom by reason of an act (9 & 10 Vict. c. 66,) and therefore, and also because it did not sufficiently appear, nor was it shown to me that the said T. Dawe and the said other poor persons had not respectively settlements, either acquired by themselves, or derived by them respectively, in some parish or township other than the said township of East Dean, that the costs incurred in their relief were properly chargeable to the common fund of the said union by virtue of the 11 & 12 Vict. c. 110, s. 3."

Alexander and *Phipson*, for the auditor, and *R. Hall*, for the township of East Dean, now showed cause against the rule. These paupers, having resided in the township of East Dean for more than five years, were irremovable therefrom by virtue of the 9 & 10 Vict. c. 66,

s. 1. Then the 11 & 12 Vict. c. 110, s. 3, provides that "all the costs incurred in the relief of any poor person who, not being settled in the parish where he resides, shall by reason of some provision of the 9 & 10 Vict. c. 66, be or become exempted from the liability to be removed from the parish where he resides, shall, when the said parish shall be comprised in any such union as aforesaid, be charged to the common fund of such union, so long as such person shall continue to be so exempted." This township being with the Westbury Union, the case falls directly within the clause.

[LORD CAMPBELL, C. J. The question is, whether the 11 & 12 Vict. c. 110, s. 3, applies to paupers who were irremovable independently of the 9 & 10 Vict. c. 66.]

The auditor has not decided on the ground that these persons had not a settlement elsewhere than in East Dean; he proceeds solely on the fact of the five years' residence. With the exception of Eliza Tingle, it is by no means clear that these paupers are really not settled elsewhere.

[COLERIDGE, J. Your argument would throw on the common fund the expense of maintaining all paupers resident for five years in East Dean who have not gained a settlement elsewhere.]

Probably that is the effect of the act. Suppose these paupers had resided in any other parish for five years, they would be irremovable and chargeable to the common fund. If this were not so, the 9 & 10 Vict. c. 66, could never apply, except where a pauper has a known settlement. If it should afterwards turn out that these paupers have a settlement elsewhere, how is the charge to be set right?

[WIGHTMAN, J. The 9 & 10 Vict. c. 66, s. 1, only applies where there has been an attempt to remove.]

Its effect is rather to prevent such attempts being made, and that is the way in which it practically operates.

Pashley and *Dowdeswell* were not called upon to support the rule.

LORD CAMPBELL, C. J. This is a very unjust attempt to prevent the operation of the statute, and to throw the charge of these paupers on the common fund of the union. The object of the 11 & 12 Vict. c. 110, clearly is to cast on the union fund the expense of that class of persons only who are rendered irremovable by the 9 & 10 Vict. c. 66. Unless it be shown that these paupers become irremovable by virtue of that act, no use can be made of the subsequent statute. Now, these paupers were irremovable not by virtue of that act, but were so before it passed, on the ground that they had no settlement anywhere to which they could be removed. That being so, the cost of their relief is not cast on the common fund of the union, and the auditor was wrong, and the allowance must be quashed.

COLERIDGE, J. I am of the same opinion. We must look at this case upon the facts presented to us by the auditor, and on the grounds stated by him. That being so, it comes to the question whether he

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has rightly construed the 9 & 10 Vict. c. 66, which applies only to paupers who might have been removed to the place of their settlement, and not to the paupers who have no settlement. The words must be read as if restrained to such cases.

WIGHTMAN, J. The 11 & 12 Vict. c. 110, s. 3, is only applicable to cases falling within the 9 & 10 Vict. c. 66; and that does not extend to persons who had no place of settlement to which they could be removed.

Rule absolute to quash the allowance.

Ex parte EGGINGTON.¹

November 2 and 21, 1853.

Municipal Corporation — Commitment of Town Clerk for not accounting — Civil Process — Arrest on Sunday — Subsequent Detainer — Prisoner — Habeas Corpus — Affidavit to explain Return.

The summary remedy provided for by the 5 & 6 Will. 4, c. 76, s. 60, of committing to gaol town clerks or other officers appointed by a town council, who wilfully refuse to account or deliver up books, &c., to the council, is in the nature of civil process, and an arrest under such a warrant of commitment upon a Sunday, is illegal.

Nor can a prisoner so arrested be legally detained under a second warrant, subsequently lodged against him, which has been issued at the instance of the same parties, though not in their capacity of town council, but as commissioners under a local act.

But a detainer under a *ca. sa.* subsequently issued by a third party, and without collusion, is a valid ground for refusing to discharge the prisoner.

Where a return to a *habeas corpus* states that a prisoner is detained under civil process, it is competent to him to show, by affidavit, that he was originally arrested on a Sunday.

A writ of *habeas corpus* had issued to bring up into this court the body of Alfred Eggington, who had been committed to the custody of the keeper of Stafford gaol, under a warrant of commitment issued by two justices, for the city and county of Lichfield, on the 8th of October, 1853.

This warrant, which was directed to "the constables and dozers of the city and county of Lichfield, and to the keeper of the common gaol of Stafford," recited a complaint on behalf of the town council of Lichfield, "that Alfred Eggington, late clerk of the said city, was, on the 12th of September, 1853, duly required by notice in writing, under the hands of the members of the council of the said city, in pursuance of the order and direction of the said council, to deliver to James Burton, who was by the said council authorized to receive the same, a true account in writing of all matters committed to his charge,

¹ 23 Law J. Rep. (N. S.) M. C. 41; 18 Jur. 224; 2 Ellis & Blackburn, 717.

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by virtue of the 5 & 6 Will. 4, c. 76, and also of all moneys by him received by virtue and for the purposes of the said act, and also of the amount expended and disbursed by him, and for what purposes, together with proper vouchers for such payments, and also a list of the names of all such persons as had not paid the moneys due from them for the purposes of the said act, and of the amount due from each of them; and also to deliver to the said J. Burton, so authorized as aforesaid to receive the same, all books, papers, and writings in his custody or power relating to the execution of the said act, and to give satisfaction to the said J. Burton respecting the same;" that Eggington had refused to deliver the said account, &c., and that a warrant and summons to answer the said complaint had been issued and served upon Eggington, who had not appeared in obedience thereto; that the said justices had proceeded to hear and determine the matter of the said complaint; and that upon such hearing it duly appeared to them, "that he had wilfully neglected to deliver such account, and the vouchers relating thereto, and such lists as aforesaid, and that certain books, papers, and writings relating to the execution of the said act, and particularly the corporation minute-book and check-book, remained in the hands or in the custody or power of the said A. Eggington, and that he had wilfully neglected to deliver the same, or to give satisfaction respecting the same." The justices then adjudged "that the said A. Eggington shall be committed to the common gaol at Stafford (being the common gaol for the said city and county of Lichfield) there to remain without bail until he shall have delivered a true account as aforesaid, together with such vouchers and lists as aforesaid, and until he shall have delivered up such books, papers, and writings, or have given satisfaction in respect thereof to the same J. Burton as aforesaid." The warrant then commanded the said constables, &c., to take the said A. Eggington, and him safely to convey to the said gaol at Stafford, there to deliver him to the keeper thereof, and the said keeper to receive the said A. Eggington into his custody in the said gaol, there to imprison him until he shall have delivered, &c. [as in the adjudication.]

On the 24th of October, 1853, another warrant of commitment, under the hands of the same justices, also dated the 8th of October, which was substantially in the same form and to the same effect as that last stated, was lodged with the keeper of the gaol at Stafford.

The gaoler returned the writ of *habeas corpus* that he received the said A. Eggington into his custody on the 17th of October, 1853, and that the residue of the execution of the said writ appeared by certain schedules thereto annexed. These schedules merely contained copies of the two warrants above mentioned. This return having been read, —

Gray moved that the prisoner might be discharged. He produced an affidavit stating that Eggington was, on Sunday the 16th of October, 1853, taken into custody under the said warrant first mentioned, and taken to Stafford by the midnight train, and there delivered to the keeper of the said gaol.

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[LORD CAMPBELL, C. J. Is such an affidavit admissible?]

Yes. It does not contradict the return; and the fact of the arrest having taken place upon a Sunday cannot otherwise be brought before the court. The first arrest was bad under the 29 Car. 2, c. 7, s. 6, which enacts, "that no person upon the Lord's Day shall serve or execute any writ, process, warrant, order, judgment, or decree (except in cases of treason, felony, or breach of the peace,) but that the service of every such writ, &c., shall be void to all intents and purposes whatsoever." The default provided for in the 5 & 6 Will. 4, c. 76, s. 60, is a civil and not a criminal matter, and is rather in the nature of a *capias ad satisfaciendum* in a civil suit. The section at the end of it reserves the right of proceeding against the officer by action. This shows that it is a civil proceeding. *Rex v. Myers*, 1 Term Rep. 265, decided that a party convicted under a statute and committed for non-payment of the penalty cannot be apprehended on a Sunday. The statute of Charles applies wherever there has been no breach of the peace. *Rawlins v. Ellis*, 16 Mee. & W. 172. Then, if the original arrest was illegal, the subsequent detainer under a warrant issued for the same cause by the same parties cannot be good. In *Taylor v. Phillips*, 3 East, 155, Lord Ellenborough, C. J., said, that it was a matter of public policy that no proceedings of the nature described in the statute should be had on a Sunday, and that they could not be made good by any assent or waiver by the party illegally arrested. If so, it would be an evasion of the statute to allow parties who have illegally arrested another to take advantage of that illegal capture.

[COLERIDGE, J. I suppose if Eggington had got out of prison on the 23d he might have been retaken on the 24th under the second warrant?]

Probably he might; but that is a very different case. There are several authorities which decide that a person illegally arrested cannot be detained by civil process issued at the suit of the same party and for the same cause.

Pashley, for the justices, and *W. R. Cole*, for the town council, showed cause. It is conceded that in civil process a party who arrests another illegally cannot detain him by subsequent process. But neither that rule nor the privilege from arrest upon Sunday applies to this, which is a commitment for an offence, not indictable indeed, but for which a specific remedy is provided by the 5 & 6 Will. 4, c. 70, s. 60. He is there expressly called an "offender."

[COLERIDGE, J. You must make out that this is "treason, felony, or breach of the peace." In *Taylor v. Freeman*, Selw. N. P. 910, it was held that a warrant committing a person for getting a bastard was not within the statute of Charles.

LORD CAMPBELL, C. J. Is there any case where an arrest upon a Sunday for any thing short of an indictable offence has been held legal?]

Every violation of a statute is indictable and in its nature a breach of the peace, which words are construed largely. *Johnson v. Collison*,

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Sir T. Raym. 250. In *The Queen v. Richards*, 5 Q. B. Rep. 926, where the prisoners were taken to gaol under a bad warrant, but a good warrant lodged subsequently was also returned as a ground of detainer, the court said they would not look at the first warrant, but remanded the prisoners on the good warrant.

Gray was not called upon to reply.

LORD CAMPBELL, C. J. I am of opinion that the prisoner should be discharged from custody under these warrants. Although the return is good on its face, it is competent to show by affidavit the fact that the arrest took place upon a Sunday. If such a course were not allowed, that or any other privilege from arrest would be wholly unavailing, as the fact upon which it rests would not appear upon the return. We come, then, to the question whether this warrant was one which could be legally executed on a Sunday. I think it does not fall within the exception in the statute of Car. 2, according to any construction which has ever been put on the words of that exception. This was not a commitment for an indictable offence, but merely for not performing a duty similar to that spoken of in the same section of paying over money. The mode of proceeding against a town clerk for either withholding money or not delivering up documents is the same. In one sense, no doubt, he is an "offender," but he has committed nothing which is either actually or constructively a breach of the peace. It is the same as if judgment had passed against him in an action of detinue for these documents and he had been taken under a *ca. sa.* founded on that judgment. Such process clearly could not have been executed on a Sunday. That being so, the arrest on the 16th of October was illegal and void. What, then, is the effect of the warrant subsequently lodged? This being in the nature of civil process, the detention under that warrant was also illegal. It is allowed that in civil process, after an arrest on a Sunday, the same individual cannot by suing out fresh process take advantage of the illegal arrest. Here the town council of Lichfield must be considered as having sued out the first process and having executed it on a Sunday, and to have also sued out the second process to detain the party so illegally arrested. If we held this could be done it would be enabling them to take advantage of their own wrongful act.

COLERIDGE, J. I am of the same opinion. As to this being a civil process, I will only add that the same clause which calls this person an "offender" does not give, but saves, the right of proceeding by action. This shows, therefore, that an action might have been maintained independently of the clause which substitutes a summary remedy to enforce the civil duty. The common rule consequently applies, that the same party shall not, by issuing second process, avail himself of his own illegal act.

WIGHTMAN, J., concurred.

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ERLE, J. It seems to me clear that the caption virtually took place in a civil proceeding; and that, consequently, the same party cannot detain the person so captured by a second process issued for the same cause. The prisoner must, therefore, be discharged from this custody. But I am also of opinion, that when he has been once set at liberty, there is nothing to prevent his being immediately re-taken under the same warrant.

The prisoner was accordingly ordered to be discharged.

This order for the discharge of the prisoner was received by the gaoler of Stafford on the 3d of November. On the 1st of November another warrant of commitment by two justices of the city of Lichfield, dated the 31st of October, and issued on the complaint of the town council of Lichfield, acting as commissioners under a local act for cleansing and paving, &c., the streets of Lichfield, against Eggington, for not delivering up the books in his custody, as clerk to the commissioners, was lodged with the gaoler, and under it he detained the prisoner in custody. In the afternoon of the 4th of November a warrant under a writ of *ca. sa.*, issued without any collusion at the suit of a creditor of the prisoner, was lodged with the gaoler.

Upon an affidavit stating the above facts,

Gray obtained a rule to show cause why a writ of *habeas corpus* should not issue to discharge the prisoner out of custody, and why, in the event of the rule being made absolute, he should not be discharged without the writ of *habeas corpus* actually issuing.¹

Cause was now (November 21) shown against this rule, by

Pashley, for the town council, and *Griffiths*, for the execution creditor. The town council in issuing this warrant acted in a very different capacity from that in which they issued the former warrants, and the prisoner is proceeded against as their clerk in their office as commissioners, and, in the absence of any collusion, the detention under this warrant is legal. *Collins v. Yewens*, 10 Ad. & E. 570. But the prisoner is at all events not entitled to his discharge from custody under the *ca. sa.* The original illegal arrest was not the act of the sheriff or of the detaining creditor. *Barratt v. Price*, 9 Bing. 566, as explained in *Robinson v. Yewens*, 5 Mee. & W. 149, cannot be relied upon as an authority for the discharge. They referred also to *Hovson v. Walker*, 2 W. Black. 823; *Davies v. Chippendale*, 2 Bos. & P. 282; *Ex parte Cogg*, 6 Dowl. P. C. 461; *Barclay v. Faber*, 2 B. & Ald. 743; and *Re Ramsden*, 15 Law J. Rep. (N. S.) M. C. 113.

Gray, contra. Neither the sheriff nor the gaoler can detain a party

¹ *Pashley* objected to the form of this rule, but the court observed that it was a usual and convenient course, as it saved expense.

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who is in illegal custody under an unlawful arrest. The prisoner was illegally detained after the receipt of the order of this court for his discharge, because the town council in lodging the fresh warrant were taking advantage of their own wrong, which they could not do. At the time when the *ca. sa.* was lodged the prisoner was in point of law out of custody, and could not, therefore, be properly detained.

[COLERIDGE, J. There was no illegal arrest by the sheriff. The prisoner was not at the time in the civil custody of the sheriff.]

Where a person is in custody on the criminal side of this court, he cannot be charged under a *ca. sa.* without the leave of the court. In *Barratt v. Price*, the defendant was in custody some time before the warrant was in the hands of the sheriff, and the arrest there was by the sheriff's officer.

[WIGHTMAN, J. If the gaoler chooses to detain the prisoner, may not the sheriff go and arrest him?]

The sheriff himself might have gone and arrested him; but here the gaoler is in the situation of the sheriff's officer in *Barratt v. Price*, and there was a wrongful detention therefore under the *ca. sa.* The sheriff adopted the illegal act of the gaoler. *Robinson v. Yewens*. The effect of holding this detention good will be to allow a party to take advantage of an arrest on Sunday, contrary to the 29 Car. 2, c. 7.

LORD CAMPBELL, C. J. If the prisoner were now detained only under the warrant at the suit of the town council, acting as commissioners, I should have thought that he would be entitled to his discharge; because this warrant, having been obtained by the same persons who had sued out the former warrant, they could not be allowed to take advantage of what must be considered their own wrong. But, under the *ca. sa.*, I think the execution creditor is entitled to have the prisoner detained. The order for his discharge was received by the gaoler on the 3d. of November, and on the next day the *ca. sa.* is lodged with the sheriff. The prisoner was then in the sheriff's bailiwick, and the sheriff might have gone to the gaol and with his own hands arrested the prisoner. That being so, I see no reason why he might not issue a warrant to the gaoler, which should have the same effect. The detention, therefore, is good and lawful.

COLERIDGE, J. The principle in *Barratt v. Price* is quite a sound principle, namely, that where the sheriff has by his own act illegally arrested a party, the unlawful custody cannot be made effective for the purpose of an arrest under other writs which he holds; but that is not applicable to the present case. Here a judgment creditor, not connected with the town council, lodges a *ca. sa.* with the sheriff for execution. What was the sheriff then to do? Would he have been justified in not arresting the execution debtor? It seems to me the circumstances would have been no answer to an action against the sheriff for not arresting. He was bound, I think, to make the arrest, and the arrest was not the less legal because the sheriff issued his

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warrant to the same gaoler who had the prisoner in illegal custody at the time.

WIGHTMAN, J. I am of the same opinion. The argument on behalf of the prisoner has been shaped as if the illegal detention were by the officer of the sheriff; but that was not so. The gaoler was acting under a warrant of justices directed to him; and I think, in accordance with the decisions, that the arrest by the sheriff under the *ca. sa.* was lawful.¹

Rule discharged, without costs.

In the matter of THE SURVEYORS OF THE HIGHWAYS OF TRYDDYN;
*Ex parte HARRISON.*²

January 13, 1854.

Highway — Costs of Indictment for Non-repair — Distress — Highway Rate.

The costs of an indictment against a parish for non-repair of a highway, ordered to be paid to the prosecutor by the Quarter Sessions, under section 95 of the 5 & 6 Will. 4, c. 50, are not recoverable by distress against the surveyor, under section 103, but are to be paid out of the rate made and levied in pursuance of that act.

It is the duty of the surveyors who are in office when such an order for costs is made, or of their immediate successors in office, to pay the costs out of any funds then in their hands, or, if they have none, to make a rate for the purpose of putting themselves in funds.

A RULE had been obtained, calling upon three of the justices of the peace for the county of Flint, and upon J. Lloyd and R. Bellis, the surveyors of the highways for the township of Tryddyn, in the same county, to show cause why the said justices should not issue their warrant for distress and sale of the goods and chattels of the said J. Lloyd and R. Bellis, for recovery of 72*l.* 8*s.* 3*d.*, by an order of Sessions, dated the 1st of July, 1853, ordered to be paid out of the highway rate for the said township to Charles Harrison, for the costs of a prosecution against the inhabitants of the said township for the non-repair of a highway.

The following were the facts upon which this rule was founded. In July, 1851, Harrison applied to George and John Edwards, the then surveyors of the highways for Tryddyn; to repair a highway lying therein, which they refused to do; and an information was accordingly laid before a justice of the peace, who issued his summons to the said surveyors to appear at a special session for the highways on the 25th of March, 1852, at which the said then surveyors duly appeared, and having denied the obligation of the township to make

¹ Erle, J., had left for chambers.

² 23 Law J. Rep. (N. S.) M. C. 45; 18 Jur. 399.

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such repairs, the justices then assembled ordered that Harrison should prefer a bill of indictment at the next Quarter Sessions for the county of Flint against the inhabitants of the said township for non-repair of the said highway. A bill was accordingly found at the Quarter Sessions, upon the trial of which a verdict of guilty was taken by consent and a fine of 50*l.* imposed upon the defendants, and the court also made an order, that "the costs of the prosecution incurred by Harrison, amounting to 72*l.* 8*s.* 3*d.*, should be paid to him by the inhabitants of the said township on or before the 31st of August, 1852, out of the rate made and levied or to be made and levied within the said township," in pursuance of the 5 & 6 Will. 4, c. 50. On the 26th of April, 1853, J. Lloyd and R. Bellis were appointed surveyors, and payment of the costs under the above order of Sessions having been demanded of and refused by them, an information was laid against them by Harrison, which came on to be heard before the three justices named in this rule, when service of the order of Quarter Sessions and the demand and refusal of the costs were admitted by the surveyors, but the said justices refused to issue a distress warrant for levying the said costs.

R. V. Williams showed cause.¹ This order of Sessions cannot be enforced by distress against the surveyors: at all events, not against the present surveyors. This is a duty cast upon the inhabitants at large, and the rate is the fund out of which the costs are to be paid—section 95, of the 5 & 6 Will. 4, c. 50. *The Queen v. Watford*, 4 Dowl. & L. P. C. 593, shows that the order would be bad if it did not specify the fund.

[WIGHTMAN, J. How are they to be compelled to pay?]

A mandamus might perhaps issue to make a rate. In *The Queen v. Clark*, 5 Q. B. Rep. 887, that course was adopted. Section 103 of the 5 & 6 Will. 4, c. 50, will be referred to, but that does not apply to costs ordered to be paid by the Quarter Sessions upon the trial of an indictment, which are specifically provided for as to be paid out of the rate. *Sellwood v. Mount*, 1 Ibid. 726, was decided on section 90, which provides that the costs there mentioned shall be recoverable as forfeitures, thereby referring to section 103.

[He also argued that the order of Sessions was bad, for directing the *inhabitants* to pay out of the rate, which they had no power to levy; but the court did not decide on this point.]

Pashley and *E. Beavan*, in support of the rule. The present is the proper mode of enforcing payment of these costs. In *The Queen v. Clark* some doubt is thrown out whether a mandamus is correct. Section 27 gives to the surveyors the sole power of making a rate. They are, therefore, at any moment able to get funds applicable to this purpose; and as no inability is suggested, it must be assumed

¹ Nov. 21. Before Lord CAMPBELL, C. J., COLERIDGE, J., WIGHTMAN, J., and ERLE, J.

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that the surveyors have money available for this purpose. The section expressly applies to "all costs and charges to be allowed and ordered by the authority of this act," within which expression these costs clearly fall.

[COLERIDGE, J. The question is, whether "the manner of levying, recovering, and applying" of these costs is not otherwise particularly directed.]

The object of the section is to provide a summary remedy for all cases where money is ordered to be paid, as well as to penalties and forfeitures.

[ERLE, J. *Sellwood v. Mount* decides, that the simple non-payment of costs under the order of a competent tribunal, is not "an offence" within the meaning of section 103.]

According to *Ex parte Eggington*, 23 Law J. Rep. (N. S.) Q. B. 41; s. c. *ante*, p. 146, the word "offence" may extend to such a case. It is quite plain, that section 103 extends to other cases besides penalties and forfeitures; for instance, it includes balances due from a surveyor.

Cur. adv. vult.

Judgment was now delivered by

LORD CAMPBELL, C. J. This was a rule calling on three justices of the county of Flint to show cause why they should not issue their warrant for distress and sale of the goods of John Lloyd and another, surveyors of the highway in, and inhabitants of the township of Tryddyn, for recovery of 72*l.* 8*s.* 3*d.*, by an order of Sessions, dated the 1st of July, 1852, ordered to be paid out of the highway rate for the township, to Charles Harrison, for the costs of a prosecution against the inhabitants of the township for the non-repair of a highway.

In this case, by consent, a verdict at Sessions had passed for the crown, and the costs of the prosecution were directed by the justices to be paid out of the highway rate. This was in pursuance of the power given by the 95th section of the General Highway Act, 5 & 6 Will. 4, c. 50, the words of which are, "The costs of such prosecution shall be directed by the justices at such Quarter Sessions to be paid out of the rate made and levied in pursuance of this act, in the parish in which such highway shall be situate." The words "rate made and levied," &c., do not point merely to any particular assessment already made and levied at the time when the order of Sessions issues, but to the highway rate in general; and it was the duty of the persons who were in office at the time the order was made, to pay the costs out of any funds then in their hands; or if they had none, to make and levy a rate for the purpose of putting themselves in funds. If properly applied to, and neglecting to pay costs, which in the one way or the other they possessed or might procure for themselves the means of paying, they would be guilty of a breach of duty; and what is true of them would apply to their immediate successors. But unless something more be found in the act than is

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contained in this section, the remedy now sought for, to enforce performance or punish neglect of duty, could not be applied; the common law would help the party entitled to costs by a writ of mandamus, but the proceeding by warrant of distress and sale must be founded on statute. Accordingly, for the rule, counsel relied on the 103d section, the words of which are, "all penalties and forfeitures by this act inflicted or authorized to be imposed for any offence against the same, and all balances due from a surveyor, and all costs and charges to be allowed and ordered by the authority of this act, *the manner of levying, recovering, and applying of which is not hereby otherwise particularly directed*, shall, upon proof and conviction of the offences respectively before any two or more justices, either by the confession of the party offending, or by the oath of any credible witness or witnesses, which oath such justices are in every case hereby fully authorized to administer, or upon order made as aforesaid, be levied, together with the costs attending the information, summons, and conviction, by distress and sale of the goods and chattels of the offender or person liable or ordered to pay the same respectively, by warrant under the hands of two or more justices, before whom the party may have been convicted." We are of opinion that these words do not apply to the present case, notwithstanding the generality of the expression "all costs and charges to be allowed and ordered by the authority of this act." The subject-matter of the section are those penalties and forfeitures, those balances due from a surveyor, and all those costs and charges to be allowed and ordered by authority of the act, "*the manner of levying, recovering, and applying of which is not hereby otherwise particularly directed*." These latter words seem scarcely applicable in themselves to the costs now in question, for the statute has pointed out the specific fund from which they are to be paid; impliedly it authorizes and commands the surveyor to pay them from that fund, and the application of them when paid it was totally unnecessary to specify. The costs of a prosecution of an indictment being given, it must be intended that they were given to the party prosecuting.

But waiving that argument, what is to be done in order to proceed under the section? There must be either "proof and conviction of the offences respectively," — which clearly cannot apply except in cases of offences which cause penalties or forfeitures to be incurred, and, at most, balances to be paid, the non-payment of which is the offence to be proved and convicted of — or there must be an order made; and that order must make it an immediate and direct duty for the party on whom it is made, to pay what is ordered to be paid, whether it be penalty, forfeiture, balance, or costs. But this cannot apply to the case before us, for the fund being specified, and that being a rate made or to be made, reasonable time to put himself in funds must necessarily be given to the surveyor. He is guilty of no default until such time has elapsed; if he has to make a rate, that rate may be appealed against to the Quarter Sessions; considerable delay may occur without any fault of his, and to suppose that "upon order made" he becomes at once liable to distress and sale of his

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goods, or imprisonment, is not only unreasonable but inconsistent with the 95th section, which gives recourse specially to the highway rate, with all the consequences of course implied to which we have just alluded. When we proceed with the section, we find that its further provisions are confined to the case of fines, penalties, and forfeitures, and the costs made incident to them, and are wholly inapplicable to the present case; and the section concludes with applying the penalties and forfeitures when levied, half to the informer, and half to the surveyor of the parish where such offence, neglect, or default shall happen, to be applied towards the repair of the highways thereof, unless the surveyor shall be himself the informer, in which case the whole shall be applied towards the repair of such *highway* (meaning probably *highways*.) Looking, then, at the whole section, which is very carelessly drawn, it seems to us clear that the object of it is to provide means for the recovery of penalties and forfeitures, and unpaid balances, and the costs and charges incident to the proceedings which may be had for imposing the two former or for procuring the order for the payment of the latter; all these are summary proceedings, and it is clear that to summary proceedings only the legislature was looking when it enacted these provisions. The parties applying for the rule, therefore, have mistaken their course, and it must be discharged.

Rule discharged.

GOMPERTZ v. BARTLETT.¹

November 14 and 16, 1853.

Implied Warranty — Sale of Bill of Exchange — Difference of Description — Failure of Consideration.

The vendor of a bill of exchange impliedly warrants that it is of the kind and description that it purports on the face of it to be.

Where, therefore, an unstamped bill of exchange, purporting to be a foreign bill drawn at Sierra Leone, but which had been really drawn in London, was sold, and refused payment by the acceptor: —

Held, that the vendee was entitled to recover back the price of the bill, on the ground of a failure of consideration.

ACTION for money payable by the defendant to the plaintiff, and for money received by the defendant for the use of the plaintiff.

Plea. — Never indebted.

On the trial, before Lord Campbell, C. J., at the sittings in London after Trinity term last, it appeared that the plaintiff and the defendant had for the previous six or eight months considerable dealings

¹ 23 Law J. Rep. (N. S.) Q. B. 65; 18 Jur. 226; 2 Ellis & Blackburn, 849.

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together in respect of the discounting of bills of exchange; and in January last the defendant produced to the plaintiff, for the purpose of being discounted, an unstamped bill, purporting on the face of it to have been a foreign bill drawn at Sierra Leone, and accepted in London, but which it appeared was, in fact, drawn in London. The defendant then stated to the plaintiff that he believed the bill to be perfectly good, and that it would be paid at maturity; that he would not put his own name upon it, but that the plaintiff might take the bill and make inquiries about it, and that if he approved of it he, the defendant, would pay a liberal discount upon its being taken without his name. The plaintiff took the bill, and upon inquiry was informed that the parties to it were respectable, and he thereupon paid the defendant the amount of the bill, less 85% discount. The plaintiff afterwards indorsed the bill to a person named Rogers, for the full amount, less 5% per cent. discount. The bill was afterwards dishonored, the acceptor becoming bankrupt, and the plaintiff was compelled to repay the amount he had received from Rogers. Bills of the same kind had before been paid by the acceptor, and an endeavor was made to prove under the bankruptcy of the acceptor for the amount of the bill, but the commissioner refused to allow it, as the bill was not stamped. Upon these facts, the learned judge was of opinion that the action could not be maintained, and the plaintiff was nonsuited, leave being reserved to move to set aside the nonsuit, and to enter a verdict for the plaintiff for 815%.

In the present term a rule *nisi* was accordingly obtained, against which

Montague Chambers and *Pearson*, showed cause. The bill was a perfect bill of exchange, though unstamped. The acceptor was in the habit of paying bills such as these. The mere fact that his bankruptcy prevented him paying it, cannot entitle the plaintiff to recover back the money he paid for it. There has been no failure of consideration.

[WIGHTMAN, J. Will not the rule *caveat emptor* apply to a latent defect such as this?]

There is no implied warranty that the bill was drawn at any particular place, or that it did not require a stamp, or that it was more a bill of exchange than it purported to be on its face, or that it was of a merchantable character. In *Parkinson v. Lee*, 2 East, 314, it was held that there was no warranty that hops sold by sample were of a merchantable quality, and there was no more a warranty of the bill in this case. The principle of *caveat emptor* clearly applies. Co. Lit. 102, a. *Bree v. Holbech*, Dougl. 630; *Chandelor v. Lopus*, Cro. Jac. 4, and *Taylor v. Bullen*, 5 Exch. Rep. 779. Here the plaintiff had the bill to inspect. He took it away, and made such inquiries about it as he pleased. He had every power of ascertaining the truth.

[WIGHTMAN, J. How can you distinguish this from the case of a forged bill? There is an implied warranty that the instrument is genuine, though there is none that the parties are solvent. Byles on Bills, 266.]

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It has never been held as part of a definition of a bill of exchange that it should be drawn upon a proper stamp. This bill is a genuine bill, and might have been enforced abroad. If a horse sold without a warranty die, the day after the purchase, of a latent defect existing before the sale, the loss falls on the purchaser. *Jones v. Ryde*, 5 Taunt. 488, is distinguishable, for a forged bill is no bill at all. *Chapman v. Speller*, 14 Q. B. Rep. 621, is much in point to show that the plaintiff cannot recover this money back; this is like the case of *Baglehole v. Walters*, 3 Camp. 154, and *Pickering v. Dowson*, 4 Taunt. 779. There was no representation whatever made at the sale of the bill, which distinguishes this case from *Bridge v. Wain*. 1 Stark. 504. At most, it was but a sale of what purported to be a foreign bill.

[COLERIDGE, J., referred to *Wilson v. Vysar*, 4 Taunt. 288.]

The remedy here, if at all, was by a special action, and the plaintiff cannot sue for the whole price, upon the ground of failure of consideration. *Kempson v. Saunders*, 4 Bing. 5, may be relied on by the other side, but that case rests upon the ground that the shares sold were not salable at all.

Petersdorff, contra. The question is, whether a vendor of that which purports to be a valid security is not liable if it turns out upon some latent defect to be invalid. The authorities that have been cited do not apply. Here the bill of exchange sold was not of the description which it purported to be when sold. It does not confer the rights and powers it purported to give. The sale and purchase was of a bill of exchange of value and capable of being enforced. In *Young v. Cole*, 3 Bing. N. C. 724, where bonds were sold as Guatemala bonds, and it turned out that they had not been sealed at the time required to render the estate liable, it was held that they could not be considered as Guatemala bonds, and that the vendor was bound to refund the purchase-money. So, here, in point of law, this cannot be considered as a bill of exchange. It purported to be a foreign bill, and apparently did not require a stamp, and the defendant impliedly represented it to be a foreign bill. In Addison on Contracts, vol. 1, p. 152, the law is correctly stated to be, that if a man goes into the money market with a bill or note and gets it discounted, and it is not the bill or note of the parties whose names appear upon it, the money received in exchange for it cannot lawfully be retained, and that declining to indorse the bill does not rid the party negotiating it from the liability which attaches to him for putting off an instrument as of a certain description which turns out not to be such as it is represented. The case of *Jones v. Ryde* is not distinguishable from the present, and the decisions on the cases of forged signatures apply strongly to this case.

LORD CAMPBELL, C. J. At the trial I entertained an opinion adverse to the plaintiff. I was struck with the consideration that this was the case of a mere sale, and that the vendor had title in the thing sold, and knew nothing of any secret defect when he sold. And it was difficult to say that the bill was of no value at the time of the

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sale, because at that time there was no strong reason for supposing that it would have been paid if the acceptor had not been insolvent, and even now payment might perhaps be enforced in a foreign country. I then thought that the rule *caveat emptor* applied; but after hearing the argument and the authorities cited, I think the action is maintainable, and upon this ground, that the article sold did not answer the description under which it was sold. If it had been a foreign bill and there had been any secret defect, the risk would have been that of the purchaser; but here it must be taken that the bill was sold as and for that which it purported to be. On the face of the bill it purported to be drawn at Sierra Leone, and it was sold as answering the description of that which on its face it purported to be. That amounted to a warranty that it really was of that description. Then, in point of fact, it is not a bill of that description. It is not a foreign bill, but was drawn in London, and payment of it could not be enforced here. This is not the case of a sale of goods answering the description of the goods sold, and a secret defect in the goods; but it is the case of a thing which is not what it professed to be when sold, and upon this ground I think the money must be taken to have been paid upon a mistake of fact, the bill not answering the description of that sold. The passage quoted from Addison on Contracts very clearly, I think, lays down the law on this subject, and both *Jones v. Ryde* and *Young v. Cole* are authorities in support of the action. In principle the case is the same as if the vendor had professed to sell a bar of gold, which turned out to be mere dross colored and disguised. I am, therefore, of opinion, that the law implies a promise on the part of the vendor to repay the purchase-money, and that the action is well brought.

COLERIDGE, J. This is the case of a mere sale, and where there is a sale of goods without a warranty, the vendor is not bound to see that the thing he sells possesses either the quality or value supposed at the time of the sale. But a vendee is entitled to have a thing of the kind and description which the thing professes to be at the time of the sale. Here, in the absence of all fraud, both parties thought they were dealing about a foreign bill, which on the face of it, this bill purported to be, and it turns out not to be a bill of that kind and description, and therefore of no value; and common justice requires that the vendee should not be bound, and that the purchase-money should be recovered back.

WIGHTMAN, J. I am of the same opinion, on the ground that the thing sold does not answer the description of that which the vendor professed to sell. On its face the bill purports to be a foreign bill of exchange not requiring a stamp. It turns out, however, that so far from answering the description of that for which it was sold, it was not a bill drawn at Sierra Leone, but an inland bill requiring a stamp, and therefore not a valid bill in any court of law. I agree, that if an article sold and delivered without a warranty, answers the description of that which, at the time of sale it professed to be, and the vendor

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professed to sell, the rule of *caveat emptor* applies. *Young v. Cole* and *Jones v. Ryde* are both authorities in support of the action; and *Jones v. Ryde* is more especially an authority in point.

*Rule absolute.*¹

REGINA v. THE LORD OF THE MANOR OF WANSTEAD.²

November 17, 1853.

Copyhold — Admittance — Joint Devisees.

Where a copyhold estate is devised to several as joint tenants, the lord is bound to admit any one of them to the entirety, and cannot refuse to do so on the ground that the amount of fine claimed by him is not paid.

A RULE had been obtained to show cause why a *mandamus* should not issue to the lord and steward of the manor of Wanstead, commanding them to admit Emma Withers to a copyhold tenement.

It appeared by the affidavits that the tenement in question had been devised to the applicant and two other persons as joint tenants in fee, and that the co-devisees had released to Emma Withers, but that none of the devisees had been admitted. The steward refused to admit, except upon payment of a treble fine.

Willes now showed cause. The release was altogether inoperative, as it is the act of a stranger, and not yet on the court rolls, and it can never be placed on the rolls. *Matthew v. Osborne*, 22 Law J. Rep. (N. S.) C. P. 241; s. c. 20 Eng. Rep. 238. The object is to deprive the lord of the proper fine. If the lord admits the applicant to the entirety, it will operate as an admittance of the co-devisees. It is not like the case of a disclaimer. It will be said, however, that the lord must admit, and sue for his fine according to *Rex v. The Lord of the Manor of Hendon*, 2 Term Rep. 482. But by doing so, the lord would be making evidence against himself on the court rolls, if he should afterwards sue the co-devisees for their fines.

Barstow, in support of the rule. It is an elementary rule, that no fine is due until after admittance. Bac. Abr. 'Copyhold,' 1, 2; *Rex v. The Lord of the Manor of Hendon*.

[LORD CAMPBELL, C. J. You must make out a right to be admitted as sole tenant, the devise being to three.]

In *Doe d. Ashton v. Hutton*, 2 Wils. 162, it was held that the lord

¹ The subject of implied warranties is Contracts, ch. v. Book III, to which the reader is referred.

² 23 Law J. Rep. (N. S.) Q. B. 67; 18 Jur. 311.

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was bound to admit one of six devisees of a copyhold, and could not seize *quosque*. *Rex v. Wilson*, 10 B. & C. 80, is also in point.

LORD CAMPBELL, C. J. We think that the rule should be made absolute. The release was no doubt inoperative, because it was the act of parties who had not been admitted on the rolls. But the authorities show that where there is a devise to several as joint tenants, any one of them is entitled to be admitted; the lord may have such a fine as is given by law, but he is bound to admit any one of the devisees in the first instance.

COLERIDGE, J., WIGHTMAN, J., and ERLE, J., concurred.

Rule absolute.

REGINA v. THE INHABITANTS OF ST. MARY MAGDALEN, BERMONDSEY.¹

November 9, 1853.

Parish Apprentice — Binding — Regulations of Poor Law Commissioners — Construction of — Directions or Conditions — Presumption.

Certain rules issued by the Poor Law Commissioners for regulating the binding of parish apprentices, provided, by article 5, that no person above the age of fourteen should be bound without his consent, and no child under sixteen should be bound without the consent of the father, or (if he was dead) of the mother of such child; provided that where such parent should be transported, &c., such consent should be dispensed with. Article 15 provided, that the indenture should be executed in duplicate by the master and guardians, and should not be valid unless signed by the apprentice without assistance, and that the consent of the parent when requisite should be testified by his signing the indenture; and where such consent was dispensed with under article 5, the cause of such dispensation should be stated at the foot of the indenture. They also required that the justices who allowed the binding should certify at the foot of the indenture that they had examined and ascertained that these rules had been complied with. An indenture binding a poor child, purported on its face to be signed by the apprentice "without aid or assistance," and there was a certificate of a magistrate at the foot, as required by the above rules. There was nothing on the face of the indenture, nor was any evidence adduced, to show whether the indenture had been executed in duplicate, or the apprentice or his parents had consented to the binding, nor was any cause of such consent being dispensed with stated in the indenture:—

Held, that these regulations were merely directory, and that the omission to comply with them (if established) would not affect the validity of the indenture; and that the certificate of the magistrate afforded a presumption that the rules had been properly complied with.

UPON an appeal against an order, dated the 11th February, 1853 for the removal of James Spinks, therein stated to be of the age of fifteen years, and an orphan, from the parish of St. George the Martyr, in the borough of Southwark, in the county of Surrey, to the parish of St. Mary Magdalen, Bermondsey, in the said county, the Quarter

¹ 23 Law J. Rep. (n. s.) M. C. 1; 17 Jur. 1075; 2 Ellis & Blackburn, 809.

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Sessions confirmed the said order, subject to the opinion of this court on the following case:

On the hearing of this appeal it was proved by the respondent parish, that the pauper, James Spinks, had gained a settlement by apprenticeship in the appellant parish, if the indenture of apprenticeship under which he served was valid in point of law, with reference to the objections hereinafter stated, and the grounds of appeal applicable thereto.

The indenture, under which the said pauper served, was dated the 27th of October, 1851, and was made between the churchwardens and overseers of the poor of the parish of St. Mary, Newington, in the said county of Surrey, of the first part, and Henry John Lord, a boot and shoe maker, of the second part; a copy of which indenture, together with the order for binding, allowances, and certificates subscribed to or indorsed thereon, was annexed to, and was to be taken as part of this case.¹

The poor of the parish of St. Mary, Newington, are governed, provided for, employed, and managed, and the board of guardians for that parish are appointed, under a local act, 54 Geo. 3, c. 113, which said act was annexed to, and was to be taken as part of this case.

Certain rules of the Poor Law Commissioners, dated the 29th of January, 1845, were given in evidence, at the trial of the appeal, by the appellants, and were proved to have been issued by the said commissioners, and sent by them to the churchwardens and overseers of the said parish of St. Mary, Newington, more than fourteen days before the making and execution of the said indenture, and to be signed and sealed according to the statutes in that case made and provided — a copy of which rules was annexed to and formed part of this case.²

¹ The indenture was in the ordinary form for the binding of "James Spinks, a poor child of the age of fourteen years or thereabouts, who can read and write his own name," and was executed by the churchwardens and overseers of St. Mary, Newington, and the master, and by the apprentice, "in the presence of the said churchwardens and overseers, without any aid and assistance whatsoever." The certificate at the foot of the indenture, was as follows: —

"I, G. P. Elliott, Esq., one of the magistrates of the police courts of the metropolis, sitting at the police court, Lambeth, within the metropolitan police district, and in the county of Surrey, who have assented to and allowed the above binding, do hereby certify that I have examined and ascertained that the rules, orders, and regulations of the Poor Law Commissioners for the binding of poor children apprentices, and applicable to the above-named parish, contained in their general orders bearing date respectively the 29th day of January and the 22d day of August, 1845, have been complied with. Dated, &c. G. P. ELLIOTT."

² These rules purported to be made in pursuance of the powers vested in the Poor Law Commissioners by the 4 & 5 Will. 4, c. 76, and the 7 & 8 Vict. c. 101. The following were the articles material to this case: —

THE PARTIES.

Art. 1. No child under the age of nine years shall be bound apprentice; and no child that cannot read and write his own name.

CONSENT.

Art. 5. No person above fourteen years of age shall be so bound without his con-

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The said parish of St. Mary, Newington, is one of the parishes named in the schedule to those rules annexed.

The grounds of appeal applicable to the present case were as follows:—"That the said indentures were and are illegal and void, because it does not appear in the said indentures that the said James Spinks consented to the alleged binding, or that either of his parents consented thereto; that, in fact, no such consent was given; that the said indentures were and are illegal and void, because it does not appear on the said indentures that there was any cause for the consent of the parents of the said James Spinks to the said binding being dispensed with; that the said indentures were and are illegal and void, because they do not comply with the enactments, or contain the requisites of the statutes now in force for the regulation of the binding of parish apprentices, and because they do not comply with the regulations of the Poor Law Commissioners."

No evidence was given at the hearing of the appeal, except as appears from the indenture and the allowance thereof by the police magistrate and his certificate at the foot thereof, that the said indenture was executed in duplicate by the master and guardians, or the persons lawfully authorized to do so.

The said James Spinks was at the time of the alleged binding under the age of sixteen years, as appears by the said indenture.

No evidence was given on the hearing of the appeal, (otherwise than by production of the indenture with the order for binding by the police magistrate and his allowance and certificate thereon,) that at the time of the making and execution of the said indenture either of the parents of the said James Spinks was dead, or that either of the parents of the said James Spinks was at the time of the making and

sent; and no child under the age of sixteen years shall be so bound without the consent of the father of such child, or if the father be dead, or be disqualified to give such consent, as hereinafter provided, or if such child be a bastard, without the consent of the mother, if living, of such child. Provided, that where the parent of such child, whose consent would be otherwise requisite, is transported beyond the seas, or is in the custody of the law, having been convicted of some felony, or for the space of six calendar months before the time of executing the indenture, has deserted such child, or for such space of time has been in the service of Her Majesty, or of the East India Company, in foreign parts, such parent, if the father, shall be deemed to be disqualified as hereinbefore stated, and if it be the mother, no such consent shall be required.

INDENTURE.

Art. 15. The indenture shall be executed in duplicate by the master and the guardians, or the persons lawfully authorized so to do, and shall not be valid unless signed by the proposed apprentice, without aid or assistance, in the presence of the said guardians; and the consent of the parent where requisite shall be testified by such parent signing with his name or mark, to be properly attested, at the foot of the said indenture, and where such consent is dispensed with under the provisions contained in article 5, the cause of such dispensation shall be stated at the foot of the indenture by any clerk or other officer acting as clerk to the said guardians.

Art. 29 directs that the justice or justices who have allowed the binding, shall certify at the foot of the indenture and counterpart thereof, in the form there given, which was that followed in the present case.

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execution of the said indenture, or ever had been, transported beyond the seas, or in custody of the law, having been convicted of felony; or that either of the said parents, for the space of six calendar months before the time of executing the said indentures, had deserted the said James Spinks, or for such space of time had been in the service of her Majesty, or the East India Company in foreign parts; nor was any evidence given that the parents of the pauper, or either of them, were or was alive at the time of the binding; nor was any evidence given by the appellants that such binding was without the consent of the pauper, or that the indenture was not executed in duplicate; but evidence was given by the pauper that, before being bound, he went to his master for a month on liking, and was afterwards, and before the binding, examined by the magistrate who made the order for the binding and allowed the indenture.

It was contended, on the part of the appellants, that the said pauper gained no settlement by service under the said indenture, because the said indenture was illegal and void, inasmuch as it did not appear that the said indenture was executed in duplicate by the master and guardians or the persons lawfully authorized to do so, as is required by article 15 of the said rules; and inasmuch as it did not appear by the said indenture that the said James Spinks consented to the said alleged binding, or that either of his parents consented thereto, as required by article 5 of the said rules; and inasmuch as, if the said consent of the parents were dispensed with under the said proviso contained in article 5 of the said rules, the cause of such dispensation was not stated at the foot of the indenture as required by article 15 of the said rules, or in any manner whatever. The Court of Quarter Sessions overruled the objections and confirmed the order of removal, subject nevertheless to the opinion of the Court of Queen's Bench.

The question for the opinion of the court was, whether, having regard to the grounds of appeal, the indenture of apprenticeship be illegal and void on the grounds above alleged. If the court should be of opinion upon the above objections, having regard to the grounds of appeal, that the said indenture was illegal and void, then the order of Sessions and the order of removal were to be quashed; but if the court should be of opinion that the indenture was valid, then the order of Sessions was to be confirmed.

Locke and Corner, in support of the order of Sessions. The only question is, whether this indenture of apprenticeship is valid, with reference to the objections raised by the grounds of appeal, which all relate to a non-compliance with the orders of the Poor Law Commissioners. The certificate of the police magistrate at the foot of the indenture is of itself sufficient to make it valid. But independently of this, all the rules, which are not merely directory, have been strictly complied with. *Regina v. Fordham*, 11 Ad. & E. 73. It is said that there was no evidence of the indenture being executed in duplicate. But, in the first place, this should have been specifically made a ground of appeal. *Regina v. Birmingham*, 8 Q. B. Rep. 410; *Regina v. St. Mary, Bungay*, 12 Q. B. Rep. 38. Secondly, it is not a defect

which avoids the indenture. The 15th rule expressly confines the avoidance of the indenture to the case where it is not "signed by the proposed apprentice without aid or assistance, in the presence of the said guardians." This appears on the face of the indenture to have been done.

[LORD CAMPBELL, C. J. It would seem to be monstrous to require a third person relying on this settlement to produce and prove the duplicate.]

It is enough for them to show a binding, even when the execution of a counterpart by the master is required by statute. *Rex v. Fleet*, Cald. S. C. 31. *Rex v. St. Nicholas, Ipswich*, Burr. S. C. 91, shows that an indenture of apprenticeship is not void because it does not pursue all the statutory directions.

[COLERIDGE, J., referred to *Rex v. Stoke Damerel*, 7 B. & C. 563.]

There the statute expressly made the approval of the justices necessary to the validity of the indenture. The next objection here is, that the apprentice did not consent to the binding. This, however, is not required to appear otherwise than by his signing the indenture; indeed, unless the apprentice was above fourteen his consent is not required by article 5. Here he is stated to be "of the age of fourteen or thereabouts."

[COLERIDGE, J. His signature seems required to show that he can read and write his own name, according to article 1.]

Still it does not appear necessary to show his consent by any other means. Then, it is said that the consent of the parents should have been shown, or the cause of its omission stated. But it was for the appellants to prove that the indenture was executed under such circumstances as rendered their consent necessary, or that the cause of its being dispensed with was one provided for by article 5.

Knapp and J. Clerk, contra. First, as to the execution in duplicate. The grounds of appeal require the respondents to prove that every thing necessary to support the settlement has been done. One of these requisites is the execution in duplicate; and as no evidence whatever was given of this, the settlement is not made out.

[LORD CAMPBELL, C. J. There is the presumption *omina esse rite acta*, which is strengthened by the magistrate's certificate.]

That will not cure the defect, at all events, of the consent of the parents, or the reason for its omission not being stated. It must be presumed, until the contrary be shown, that the parents are still living. It cannot be for the appellants to show that the circumstances are such as to dispense with consent. The same observation applies to the want of any statement of the apprentice's own consent.

LORD CAMPBELL, C. J. This case has been very ably argued, but I must say that I feel no doubt. In the first place, we are not to assume that the regulations of the poor law commissioners have been violated in any respect; but we are bound to presume that the police magistrate has done his duty, and ascertained that they have been complied with; and there was no evidence to rebut this presumption.

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But supposing it were proved that the rules were not complied with in the respects complained of, I should still be of opinion that the quarter sessions were right in holding them to be merely directory. There is no nullifying clause in any of the articles, except as to the signing by the apprentice, which was complied with. As to the other matters, the commissioners have directed them to be done, but the omission to do them does not affect the validity of the indenture.

COLERIDGE, J. I think we must take it that the poor law commissioners have expressed in what respects they mean those rules to be absolute conditions, and in what respects they are to be mere directions. They have stated in article 15 one particular case in which the indenture is not to be valid; but that language is not repeated in regard to the other matters. It is quite clear that many of these things can only be directory. But, besides this, we have the magistrate first allowing the indenture, and afterwards, in obedience to these very rules, certifying that every thing required by them has been done. This adds to the ordinary presumption that every thing has been rightly done. I agree that if you show that there is some condition unfulfilled which can be complied with only by a statement on the face of the instrument, the magistrate's certificate would not aid it. But this is not so. The first objection is as to the consent of the parents not appearing. But this is not necessary, except it appears that the parent is alive, and his death is not one of the events in which the consent being dispensed with is required to be stated. Then, as to the child's own consent. It is not stated in terms that this is to appear on the face of the indenture; but it is required that he shall sign the instrument without aid or assistance. This, probably, was for the purpose of securing his being able to read and write. If, then, this need not appear on the face of the instrument, there is nothing to rebut the presumption.

WIGHTMAN, J. There is nothing on the face of the indenture to show that the rules have not been complied with; and I think the Sessions decided rightly, that these rules, with one exception, which has been complied with, are merely directory. I also consider the certificate of the magistrate as strengthening the presumption that every thing was properly done.

ERLE, J. I agree in drawing the presumption of fact, and I quite concur in the decision of the Quarter Sessions which held these rules directory and not going to the validity of the indenture. I think much mischief would be done by holding the indenture to be void because some of the regulations are not complied with when every thing else has been properly done. It is therefore a salutary view to read these rules as directory, unless there is something expressly stating that they are to affect the validity of the indenture.

Order of Sessions confirmed.

 Regina v. Harden.

BAIL COURT.

REGINA v. HARDEN.¹

November 25, 1853 ; and January 18, 1854.

Mandamus — Showing Cause — Costs.

Although the costs of obtaining a writ of mandamus, where cause is shown, are in the discretion of the court, yet they ought to be given to the successful party, unless there are strong grounds to the contrary.

The guardians of the N. Union sued H. in the county court, for their expenses in removing a nuisance, certain justices having made an order for its removal, under the 11 & 12 Vict. c. 123, and which order H. had disobeyed. H. applied at chambers for a prohibition, upon the ground that title to land would come in question. The learned judge did not decide the question, but suggested an application to the full court. This, however, was not made, although the county court judge himself prepared a case. The cause was tried in the county court, and a verdict passed for the plaintiffs. The judge, however, refused to make an order for payment. A mandamus, against which H. had showed cause, was then obtained, mainly upon the construction of the 11 & 12 Vict. c. 123, s. 3:—

Held, that there were sufficiently strong grounds for exempting the defendant from payment of the costs of obtaining the mandamus

In this case a rule had been obtained calling upon C. A. Holland to show cause why he should not pay the costs of a rule for a mandamus which had been directed to the judge of the County Court of Cheshire, holden at Northwich, commanding him to order payment, at such time or by such instalments as to the said judge should seem fit, of the sum of 18*l.* 15*s.* 6*d.*, for which judgment had been awarded in a plaint between the guardians of the poor of the Northwich Union and C. A. Holland. Under the 11 & 12 Vict. c. 123, s. 3, (the Nuisances Removal and Diseases Prevention Act, 1848,) certain justices had made an order directed "to the owner of a certain ditch, situate," &c., whereby they ordered "the said owner of the said ditch within forty-eight hours to cover the ditch." This order not being complied with, the guardians of the union, under the powers of the act, themselves removed the nuisance, and incurred expenses to the amount of 18*l.* 15*s.* 6*d.* A plaint for this amount issued out of the above county court, at the suit of the guardians, against Holland, as the owner of the ditch. An application was then made on behalf of the defendant to Crompton, J., at chambers, for a prohibition, upon the ground that he disclaimed the ownership of the ditch, and therefore a question of title would be raised between the parties. The learned judge, without giving any opinion upon the point, made an order that the cause should stand over until the 17th November, to enable the defendant to renew his application by motion in court. Such motion, however, was not made, and the plaint came on to be heard before a jury. The defendant objected that the judge had no jurisdiction to try the cause; but the judge, being under the impression

¹ 18 Jur. 147 ; 23 Law J. Rep. (N. S.) Q. B. 127.

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that Crompton, J., had decided that he had jurisdiction, left the case to the jury, who found for the plaintiffs; but in consequence of the judge being doubtful whether he had jurisdiction, he refused to make an order for payment, and himself prepared a case for the application to the full court. The plaintiffs, however, applied for a mandamus, against which cause was shown on the part of the defendant, but the rule was made absolute. See *Regina v. Harden*, 2 El. & Bl. 188; s. c. 18 Eng. Rep. 403.

Cowling (with him *Holland*) now showed cause. The judge of the county court was wrong, as decided in *Regina v. Harden*; but the question now is, not whether he was right or wrong, but whether, the judge having so decided, another party, who was interested in that decision, would not be justified in reasonably supposing he was right, and therefore also justified in opposing the rule. The court has power to award costs; but it is a case of discretion, and this comes within that class of cases in which the court have thought that they ought not to grant the costs. *Rex v. The Sheriff of Middlesex*, 5 Q. B. 365; *Rex v. The Lord of the Manor of Oundle*, 1 Ad. & El. 299, note (c); *Rex v. The Commissioners of The Thames Navigation*, 5 Ad. & El. 817. There is another class of cases quite distinct from the above, but still consistent with them. They are cases in which the party who supports the judgment of the court below has taken preliminary objections, and endeavored to prevent the case from being heard at all, or to have a decision upon the merits. *Regina v. The Justices of Surrey*, 14 Q. B. 684; *Rex v. The Justices of London*, 9 Q. B. 46; *Rex v. The Justices of Cheshire*, 5 Dowl. & L. 426. We did not say this cause ought not to be tried at all, but merely that it should be tried before a more competent tribunal. In *Rex v. The Mayor of Newbury*, 1 Q. B. 751, costs were awarded, but under very different circumstances to the present. They were given against the party who was himself the assailant. The question raised upon the mandamus was a new one; and in *Rex v. The Archbishop of Canterbury*, 15 East, 159, the costs were refused upon that ground. This case is similiar to that of a new trial being obtained upon the ground of misdirection, and there the court will not grant costs. 2 Arch. Prac. 1343.

Pashley, contra. The practice in these cases is now, by recent cases, put upon a clear footing; and the rule is, that costs follow the event. All cases of mandamus to inferior courts or magistrates must be upon points which are called preliminary objections; and this is just as much a preliminary objection as any other of the cases referred to.

[ERLE, J. Mr. Cowling says all they object to is trying the matter in the county court; they are quite willing it should be tried elsewhere.]

The principle upon which the cases all go is, that the party who has taken an objection which is bad, and puts his opponent to the costs of coming for a mandamus, should pay such costs. This is the rule; and it is now almost a matter of course to allow costs,

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although the court has reserved to itself a discretion; but the circumstances must be very peculiar to induce them to exercise it.

Cur. adv. vult.

January 18, 1854. ERLE, J., now delivered the following judgment. This was a rule calling on Mr. Holland to pay the costs of a rule for a mandamus to the county court judge of Cheshire to hear a suit, which was made absolute, but Holland has shown cause against it. The late cases have generally given the costs of obtaining the writ to the successful party; and though it is a matter for the discretion of the court, it is said that they ought to be given, unless there are strong grounds to the contrary. *Rex v. The Mayor of Newbury*, 1 Q. B. 751. Taking that to be the rule, I have come to the conclusion that this defendant has shown sufficiently strong grounds for holding him to be exempt. The objection that title to land was in question was true, and would have ousted the jurisdiction if there had not been a subsequent enactment. It was an objection to the tribunal, which did not decide the contest without deciding the merits: it had the sanction of the judge of the county court, and it had, in a degree, the sanction of Crompton, J., at chambers, who provided for an application to the full court for a prohibition, as appears by the statement in the case of *Regina v. Harden*. The objection had again the sanction of the county court judge, when he prepared a case for the application so provided for, and himself stayed the proceedings in order that it might be made; and in all these applications, as the law was then understood, the defendant was entitled to succeed; and the application for the mandamus was supported only by a reference to a subsequent statute, which had not been before adverted to, and then received first a judicial construction.

Rule discharged.

*In re JAMES EDMUNDSON.*¹

May 9, 1851.

Certiorari — Proceedings for the Assessment of Railway Damages.

An adjudication by two justices, under the Lands Clauses Consolidation Act, 1845, and Railways Clauses Consolidation Act, 1845, of the sum (below 50*l.*) to be paid by a railway company as compensation to a party whose lands have been injuriously affected by the exercise of their statutory powers, is an order within stat. 11 & 12 Vict. c. 43, s. 1, and is bad, under sect. 11, if the complaint on which the order is founded be made more than six calendar months after the cause of complaint arose.

Such order may be brought up by *certiorari*, to be quashed.

R. HALL, in last Hilary term, obtained a rule calling on Joseph Greenwood and William Busfield Ferrand, Esquires, two justices for

¹ 17 Queen's Bench Reports, 67.

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the West Riding of Yorkshire, to show cause why a *certiorari* should not issue to remove into this court the order after mentioned, on the grounds, (among others,) "that the said justices had no jurisdiction in the matter respecting which the said order was made; that the said order shows, on the face thereof, and the fact also is, that the cause, or several causes of complaint therein mentioned, did not, nor did any of them, arise within six calendar months before the making of the said order or the making of the complaint, or laying of the information, whereon the said order was made; that the said justices had notice, on the hearing, that the said cause or causes," &c. "did not, nor did any of them, arise within six calendar months as afore-said;" "that the sum awarded comprises compensation for injuries and damage for which the justices had no jurisdiction to award compensation, to wit," the said trespasses, and the compensation awarded, in respect of the road in the order mentioned: "that the supposed damages and injuries were not done in the exercise of any statutory power; that none of the notices, or proceedings under which alone the said damages and injuries would be done in the exercise of the statutory powers referred to in the order, so as to give jurisdiction to justices to award compensation in that behalf, are alleged on the face of the said order, nor were any such notices ever given or proceedings ever taken."

The order, a copy of which was annexed to the affidavits on behalf of the company, recited a complaint made 13th September, 1850, wherein it was stated before the said justices that the said James Edmundson was, at the time, &c., and still was, the occupier of certain closes and a road adjoining the railway of the company; that the company, in exercise of their powers under their special act¹ and the other acts incorporated therewith,² in the years 1846, 1847, during the formation of the said railway and the progress of the works thereof, did great damage and injury to the said closes, and to certain of the fences, &c. of the said closes, and to the surface, &c. of the said road, by throwing, &c. large quantities of timber, wood and stone in and on the said closes and road, &c., and by causing part of one of the said closes to be flooded with water, &c.; for which damage and injury, amounting to 31*l.* 15*s.*, the said James Edmundson had not received any compensation: that the amount of the said compensation could not be settled by agreement between the said James Edmundson and the company; and that the proper summonses and notices had been sent to the company, who had not ap-

¹ Stat. 8 & 9 Vict. c. 38, local and personal, public, "for enabling the Leeds and Bradford Railway Company to make a railway from Shipley to Colne, with a branch to Haworth." Sect. 2 incorporates the Lands Clauses Consolidation Act, 1845, and (except so far as relates to tolls) the Railways Clauses Consolidation Act, 1845; and enacts that the provisions of stat. 7 & 8 Vict. c. 59, (except so far as repealed or altered) shall operate as if reenacted.

² The other act mentioned in the argument was, 7 & 8 Vict. c. 59, local and personal, public, "for making a railway from Leeds to Bradford, with a branch to the North Midland Railway."

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peared before the said justices. The order then proceeded to state that the justices, having heard the matter of the said application, and examined James Edmundson and his witnesses upon oath, and no evidence being tendered on the other side, did "ascertain, determine, and settle" the said amount of compensation at 31*l.* 15*s.*; and did "adjudge the said company to pay the same" to the said James Edmundson, with 6*l.* 13*s.* 8*d.* costs, "on demand."

Joseph Addison (on behalf of Ferrand) now showed cause. A *certiorari* cannot issue to bring up this order. It is an order of adjudication made by two justices under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18; and the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, which are incorporated with the two special acts of the company. In sects. 145, 156, respectively, of these statutes, it is enacted that no proceeding in pursuance of them or any act incorporated therewith shall be removed by *certiorari* or otherwise into any of the superior courts. Clauses expressly taking away the right of *certiorari* have always been strictly enforced. The cases are collected in Archbold's Crown Practice, p. 155. It is objected that, by stat. 11 & 12 Vict. c. 42, s. 11, the order is bad, inasmuch as the matter of complaint did not arise within six calendar months before the making of the complaint. The objection must be maintained to the extent of showing want of jurisdiction; otherwise this court cannot review the decision of the magistrates, no other objection appearing on the face of the order; *Regina v. Bolton*, 1 Q. B. 66.

But, further, stat. 11 & 12 Vict. c. 43, s. 11, does not apply. It refers only to the recovery of forfeitures and penalties. Here the order is an adjudication between the parties, made at the request of both. If the section were held applicable to cases like the present, the result would be that the time for laying the complaint would be limited only where the amount is under 50*l.*, and the claim consequently within the jurisdiction of the magistrates, by sect. 22 of the Lands Clauses Consolidation Act.

[LORD CAMPBELL, C. J. What is the complaint referred to, in stat. 11 & 12 Vict. c. 43, s. 11, as "such complaint?"]

It is described in sect. 1, as a complaint "made to any such justice, or justices upon which he, or they have, or shall have authority by law to make any order for the payment of money or otherwise." This is not an order to pay money, in the sense contemplated by that section: the essence of this order is the justices' approval of the amount.

[LORD CAMPBELL, C. J. All judicial orders for payment of money must be preceded by an adjudication as to the matter in dispute.]

Sect 2 of the same statute, which empowers justices to issue their warrant for the apprehension of the party against whom the complaint has been made, and sect. 19, which empowers them, in certain cases, to imprison such party, if convicted, with hard labor, show that the statute was not intended to apply to a claim of a civil nature, but only to complaints and informations partaking of the charac-

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ter of criminal proceedings. It cannot apply to the case of a claim against a corporate body.

[LORD CAMPBELL, C. J. Would it not enable magistrates to adjudicate on a claim for payment made against a corporate body by a servant hired by such corporation? The case of master and servant is not within the list of excepted cases in sect. 35.]

It may be questioned whether stat. 4 G. c. 34, applies to corporations at all. In cases within the Lands Clauses Act, the adjudication is in the nature of a statutory award: it may be made upon the application of either party. If the company asked for the order, in what sense could it affect them, so as to fall within sect. 11 & 12 Vict. c. 43, s. 11?

[ERLE, J. How could such a case occur? The justices, under sect. 22 of the Lands Clauses Act, have jurisdiction only when the claim is under 50*l*. How can the company assume that the claim is so limited?]

There might have been a claim made in fact. Sects. 140, 142, of the Railways Clauses Act, may be relied on, the former of which has the phrase "ordered to be paid." But the acts of the magistrates, there pointed to, are not acts done in the execution of the ordinary powers of justices of the peace; and to such only stat. 11 & 12 Vict. c. 43, s. 11, applies. It will also be contended that the subject matter of complaint in the present case was not one which is referred to the determination of two justices by the Lands or the Railways Clauses Consolidation Act, 1845, the latter of which, in sect. 44, lays down the same course of proceedings in respect of disputed compensation as the former, which sets out those proceedings at length in sects. 22, 23, 24.

[ERLE, J. I do not think the order here is made under any of these sections: they apply to cases of disputed compensation for injuries done to parties who have had notice from the company that their lands have been taken, and whose lands have afterwards been injuriously affected through such taking: that is clear from the words of sect. 22. The present case is that of a neighboring land owner, whose property has been damaged by the works of the company.]

It has been decided, in *Regina v. Eastern Counties Railway Company*, 2 Q. B. 347; see *Glover v. North Staffordshire Railway Company*, 16 Q. B. 912, s. c. 5 Eng. Rep. 335, that compensation may be claimed under clauses of a special act not substantially differing from the clauses under discussion, for injury done to lands which have not been taken by the company.

[ERLE, J. Sect. 68 of the Lands Clauses Consolidation Act, 1845, is the clause corresponding to the clauses there decided upon.]

Sect. 6 of the Railways Clauses Act clearly includes the present case. It enacts that compensation is to be made, by the company, to the owners and occupiers of, "and all other parties interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof," "for all damage sustained by such owners, occupiers, and other parties, by reason of the

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exercise, as regards such lands, of the powers" by this act, or the special or any incorporated act, vested in the company; the amount of such compensation, except where it is otherwise provided by this or the special act, to be ascertained and determined according to the provisions of the Lands Clauses Act. Now the order itself here states, on the face of it, that the acts in respect of which compensation is claimed were acts done in pursuance of the powers vested by statute in the company. They clearly amounted to a temporary occupation under sect. 32 of the Railways Clauses Act; all compensation in respect of which is, by sect. 44 of the same act, to be determined according to the provisions of the Lands Clauses Act.

[ERLE, J. That is, in the present case, by two justices, the amount being under 50*l.*: the question, therefore, after all, is whether the order for payment is, within stat. 11 & 12 Vict. c. 43, s. 11.]

The argument then is, that this is an assessment of amount, and not an order; and, further, that, to raise the objection under stat. 11 & 12 Vict. c. 43, s. 11, the order, if it be one, must show upon the face of it that the matter of complaint did not arise within six calendar months before the making of such order.

T. F. Ellis (for Greenwood) did not oppose the rule.

R. Hall, contra, was stopped by the court.

LORD CAMPBELL, C. J. We understand it to be the wish of both parties that we should pronounce at once as to the validity of this order, without deferring our judgment till it is brought up by *certiorari*. I am of opinion that stat. 11 & 12 Vict. c. 43, s. 11, applies to the present case, and that the order is bad, inasmuch as the matter of complaint did not arise within six calendar months before the complaint was made. I think it is clear that this is an order within the scope and meaning of the statute. The words of sect. 1, with reference to which sect. 11 must be read, are very broad; they are very broad; they are, "any order for the payment of money or otherwise." The present order is made under the provisions of the Railways Clauses Consolidation Act, 1845. That act clearly treats as orders the decisions by justices for which the Lands Clauses Act provides in cases of disputed compensation, by sects. 22, 24. Sect. 140 of the Railways Clauses Act speaks of the sums awarded in such cases as "ordered to be paid" by the justices; who, in default of payment, may issue their warrant of distress. It has been contended that such an order amounts only to an award; but it is, at all events, an award under a statutory power, which power enables the referee to order payment of the sum awarded, and to issue a warrant of distress in default of payment. That is clearly an order within stat. 11 & 12 Vict. c. 43, s. 11. Mr. Addison contends that the machinery of stat. 11 & 12 Vict. c. 43, does not apply to a corporation: there is, however, enough in that act to bring a corporation within its scope, inasmuch as it comprehends a power of distress for raising sums which the magistrate orders to be paid. The

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order, therefore, as it is not in accordance with the provisions of that section, is bad.

PATTESON, J. The question in this case is whether stat. 11 & 12 Vict. c. 43, s. 11, applies to an order of justices under the provisions of the Railways Clauses Consolidation Act, 1845. Sect. 1 of the former act defines the orders to which sect. 11 refers, as "any order" by justices "for the payment of money or otherwise." I was in some doubt under what particular section of the Railways Clauses Act, or the Lands Clauses Act, with which the former, as regards cases of disputed compensation, is incorporated, the order in the present case was made. It appears, I think, to have been under sect. 6 of the former act, which provides for cases of disputed compensation to parties whose lands have been "injuriously affected." Those cases are clearly to be settled, where the claim is under 50*l.*, according to sect. 22 of the Lands Clauses Act; that is, by two justices, who have power, by sect. 24 of the same act, to "hear and determine" the cases so referred to them by the act. No particular mode of enforcing the decision is provided by the act, either where the question is referred to two justices, or where it is brought before a jury: and the question as to the mode of recovering the sum awarded, whether by mandamus, or an action of debt, or otherwise, has been frequently raised. It seems to me that, as sects. 22, 24, provide no method of enforcing payment, the case is within sect. 140 of the Railways Clauses Act, and the payment may be enforced by distress. But for this there must be an order. That will bring the case within stat. 11 & 12 Vict. c. 43. Therefore, the complaint, here, not having been made, as sect. 11 of that act directs, within six calendar months after the cause of complaint arose, the justices had no jurisdiction to make such order.

WIGHTMAN, J. It is not very important to ascertain the precise nature of the damage for which compensation has been claimed in the present case: it comes, I think, at all events, within sects. 22, 24, of the Lands Clauses Act, by which disputed cases of compensation to parties whose lands have been "injuriously affected," if the damage be under 50*l.*, are to be settled by two justices. The question is, whether an adjudication of this description is an order within stat. 11 & 12 Vict. c. 43, s. 11. It is true that the word "order" is not used in the instrument of adjudication; but it is clearly in the nature of an order, and within the very broad language of the first section of stat. 11 & 12 Vict. c. 43. That being so, there can be no doubt that it is bad by reason of the complaint having been made more than six calendar months after the cause of complaint.

ERLE, J. It seems to me that this order has been made under sect. 24 of the Lands Clauses Consolidation Act. And if it is within stat. 11 & 12 Vict. c. 43, it is bad, not being within the restrictions of sect. 11 of that act. I think that a decision by the justices of the sum that is to be paid amounts to an order to pay that sum:

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and the language of sect. 140 of the Railways Clauses Act clearly shows that it is treated by that statute as such; consequently the order in question is within stat. 11 & 12 Vict. c. 43, and is therefore bad, for the reason I have stated. It is of great importance that it should be known, as magistrates have exclusive jurisdiction in cases like these, where the amount claimed is under 50*l.*, that the time for making the complaint is limited to six months after the cause of complaint arises; and that, where the amount is above 50*l.*, the time is either unlimited, or is, at all events, not limited by stat. 11 & 12 Vict. c. 43, s. 11.

Rule absolute.

REGINA v. LONGHORN.¹

May 12, 1851.

Pauper Lunatic — Order of Justices to seize Effects for Payment of Expense.

Under stat. 3 & 4 Vict. c. 54, s. 2, which, for the repayment to parishes or counties of expenses incurred in the maintenance, &c., of criminal lunatics, enables justices to order the overseers of any parish where money, goods, or chattels, of the lunatic shall be, to seize the money, or seize and sell the goods and chattels, justices cannot authorize the overseers to levy a debt claimed as due to the lunatic, by ordering them to seize a sum of money in the possession of the alleged debtor.

And, on motion for a mandamus, at the instance of such overseers, calling upon the alleged debtor to pay them such money, the prosecutors adducing evidence to show that such debt was due, and that the sum demanded was in the possession of the alleged debtor, the court, on cause shown, refused a mandamus.

A RULE NISI was obtained, in last Hilary term, for a mandamus calling upon Edward Longhorn to deliver up to the overseers of the poor of Old Hutton and Holmescales, in the county of Westmoreland, the sum of 134*l.* 18*s.* 6*d.*, alleged to be in his hands and to belong to Richard Simpson, a lunatic. The material facts shown on affidavit for and against the rule were as follows.

Richard Simpson, a prisoner in the goal for Westmoreland under charge of murder, was tried on 9th August, 1845, and acquitted on the ground of insanity. Two justices, with a physician and a surgeon, afterwards, and while Simpson was still a prisoner, certified to a Secretary of State, according to stat. 3 & 4 Vict. c. 54, s. 1, that Simpson was then insane: and he was, by the Secretary's order, removed from the gaol to a lunatic asylum, where he remained at the time of the present application. Two justices, under sect. 2 of the statute, made an order, November 8th, 1850, adjudging Simpson's settlement to be in the township of old Hutton and Holmescales in Westmoreland; and, it having been proved to them (as the order

¹ 17 Queen's Bench Reports, 77.

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recited) that the lunatic had lands and tenements in that and other townships, and that Edward Longhorn of Old Hutton in the said county, shoemaker, was possessed of a large sum, viz. 195*l.* 4*s.* 10*d.*, of the property of the lunatic, which had arisen from the sale of an estate belonging to him, called Owebank and Fellend, in the first mentioned township, the two justices did order and authorize the said overseers to take and receive so much of the annual rents and profits of the said lands and tenements, "and to seize so much of the said money so in the possession of the said Edward Longhorn as aforesaid, as may be necessary" to pay the charges of inquiring into the insanity &c., and of the removal, and the maintenance, clothing, medicine, and care of the lunatic, incurred or to be incurred, &c. The order also recited proof given to the justices of the several sums making up the expense incurred as above mentioned; and it ordered and directed the said overseers to seize so much of the money so in possession &c., and to receive and take so much of the annual rents &c., as might be necessary to pay the several specified sums, making in the whole 134*l.* 18*s.* 6*d.* One of the overseers served a copy of the order upon Longhorn, and required him "to pay" to the said overseer "so much of the money so in the hands of the said E. L., as aforesaid, as would be necessary to pay the said several sums aforesaid, making in the whole," &c. Longhorn referred the matter to his attorney, who answered that Longhorn could not safely pay over the said sum of 134*l.* 18*s.* 6*d.*; and it was not paid.

Longhorn himself made affidavit that, in 1842, he lent 500*l.* to Simpson; who, to secure payment thereof, with interest, gave him a mortgage, dated February 12th, 1842, of a messuage, &c., called Owebank and Fellend, with proviso for redemption by payment at a day named (the day following) and power, on default, to sell, receive the purchase-money, and, after retaining the debt, interest, and costs, to pay the overplus, if any, to the use of Simpson, his executors, administrators or assigns, or as he or they should direct. That, on 1st June, 1849, default having been made, Longhorn sold the estate, received the purchase-money, and, retaining his debt, interest, and costs, paid the overplus, amounting to 195*l.* 4*s.* 10*d.*, into the Bank of Westmoreland, in his own name: that it still remained there: and that he had no money or property, or control over money or property, of Simpson, "except such trust fund." That, after Simpson was in custody for the murder, and before his trial, he executed a deed conveying all his real and personal estate to Thomas Webster and two others, for payment of the costs of his defence, and his debts, and with an ultimate trust for the benefit of his family. That, since the sale, and receipt of purchase-money, by Longhorn, Webster had applied to him for the overplus, which he had declined to pay, being informed by his attorney that questions might be raised as to the validity of the deed executed while Simpson was in custody for the said offence, and as to Simpson's competency to execute it. That, on being served with the said order of justices, Longhorn, by his attorneys, obtained counsel's advice, which was that he could not safely direct any part of the overplus to be paid to the overseers;

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nevertheless he had offered to pay the amount demanded, on being indemnified: that he had no interest in the 195*l.* 4*s.* 10*d.*, except as trustee thereof, and was still willing to pay it over on having a legal discharge or indemnity; but he was advised by counsel that the said trust fund was not liable to be seized by virtue of the order, and that, if he directed the bankers to pay it over, he might be liable for a breach of trust, and the overseers could not give him any legal discharge.

Crompton now showed cause on behalf of Longhorn.¹ (*A. W. Hoggins* appeared on behalf of the bankers.) The powers given by stat. 3 & 4 Vict. c. 54, sects. 1, 2, in the case of insane persons imprisoned for criminal offences, having been exercised in respect of Simpson as stated in the affidavit, the present application is made under sect. 2,¹ which empowers two justices to make orders for the maintenance, &c., of any such prisoner, and, if it appear that he has property, to direct the overseers to seize the money, or seize and sell the goods and chattels, or receive the rents, to the amount requisite for payment of the charges. Longhorn has offered payment under an indemnity: without it he is unsafe; for he would not be secure, as magistrates now are, by statute 11 & 12 Vict. c. 44, s. 5, in obeying an order of the court. This sum has been deposited in the bank subject to a trust which is valid unless it can be shown that Simpson was insane when he executed the deed. The application to take it out would be matter for a suit in equity, in which, perhaps, an issue would be directed to try the validity of the conveyance.

[PATTERSON, J. The order of justices here seems to contemplate things that can be taken into manual possession; it does not authorize the overseers to sue.]

The sheriff, under a *fi. fa.*, may, by stat. 1 & 2 Vict. c. 110, s. 12, seize and sue upon certain securities; but this authority does not extend to debts generally; *Harrison v. Paynter*, 6 M. & W. 387. And see *Wood v. Wood*, 4 Q. B. 397; and it was held not applicable to purchase money deposited by a vendee in the hands of a third person in trust for the vendor; *Robinson v. Peace*, 7 Dowl. P. C. 93. But,

¹ Stat. 3 & 4 Vict. c. 54, s. 2, (not affected by stat. 16 & 17 Vict. c. 97; see sect. 133 of the latter statute) enacts that, "if it shall appear, upon inquiry, to the said or any other two justices of the county," &c., "where such person is imprisoned, that any such person is possessed of property, such property shall be applied for or towards the expenses incurred, or to be hereafter incurred, on his or her behalf, and they shall from time to time, by order under their hands, direct the overseers of any parish where any money or securities for money, goods, chattels, lands, or tenements, of such person shall be, to seize so much of the said money, or to seize and sell so much of the said goods and chattels, or receive so much of the annual rent of the lands or tenements of such person, as may be necessary to pay the charges, if any, of inquiring into such person's insanity, and of removal, and also the charges of maintenance," &c., "of any such insane person, accounting for the same at the next special petty sessions of the division, &c., "in which such order shall have been made, such charges having been first proved to the satisfaction of such justices, and the amount thereof being set forth in such order."

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further, if the overseers have power under the order to take these funds, they may seize them without a mandamus.

The court then called upon

Cowling, contra. The defendant alleges the claim of persons entitled under a trust deed, which is not valid, according to *Jones v. Ashurt*, Skinn. 357. There a prisoner, about to be tried for burglary, made a bill of sale of his goods, intending them to be a provision for his son; but *Holt*, C. J., held the bill fraudulent, as made to prevent a forfeiture.

[LORD CAMPBELL, C. J. There the party was convicted; here Simpson was acquitted.]

The case differs in that respect from *Jones v. Ashurt*, Skinn. 357; but the deed is vitiated by the intention. And there is evidence here of Simpson's insanity before and shortly after he executed the deed, if not at the time. The parish officers cannot be called upon to give an indemnity, at least without some special reason. It is suggested that there might be a remedy in equity; but Longhorn is not properly a trustee.

[PATTESON, J. I do not understand how the justices can authorize the overseers to deal with debts owing to the lunatic.]

The debt is within the words "money," "goods," and "chattels," in stat. 3 & 4 Vict. c. 54, s. 2.

[LORD CAMPBELL, C. J. You must contend that, if the debt had been for goods sold and delivered, or on a bill of exchange, the overseers might have been ordered to recover it. Can the justices try the validity of the debt?]

Perhaps, if that were doubtful, they could not make the order.

[LORD CAMPBELL, C. J. It is a matter of great dispute here, whether Longhorn was debtor.

PATTESON, J. As a debt follows the person of the debtor, it would seem to result from the argument that there might be an order of this kind upon the overseers of any parish where he might happen to be. Or, if the alleged debtor had property in different parishes, there might be several orders under the statute.]

The consequence from the debt following the person must be admitted.

[PATTESON, J. Where do you find any words authorizing the overseers to sue a debtor of the lunatic?]

LORD CAMPBELL, C. J. That is the point: what makes the debtor liable to such an action?]

At least the court may grant a mandamus to try this question.

[LORD CAMPBELL, C. J. It would be a great hardship on the defendant.]

The overseers also are under a hardship. Decisions relating to the duty of a sheriff do not apply to this case.

LORD CAMPBELL, C. J. The case is not brought within the enactment relied upon. We cannot grant a mandamus. Whether or not there be any other remedy it is unnecessary to say.

Regina v. Griffiths.

PATTESON, J. The fair construction of the statute is quite against this application. The overseers are to "seize." How can they seize a debt?¹

Rule discharged.

REGINA v. GRIFFITHS.²

June 16, 1851.

Guardians of the Poor — Majority

By an order of the Poor Law Commissioners, regulating the proceedings of Guardians of the Poor in the parish of M., the election of officers was to be by a majority of the guardians present at a meeting of the board. By stat. 12 & 13 Vict. c. 103, s. 19, in case of an equality of votes upon any question at a meeting of guardians of any union or parish, the chairman has a "second or casting vote."

At an election of clerk to the guardians of M., twenty two guardians attended. On their assembling, the chairman said he should not vote for any candidate, but merely preside at the meeting as chairman. He did so, and took the votes, of which there were eleven for one candidate and ten for another. The former was declared elected, and entered upon the office. On motion for a *quo warranto*: —

Held, that the chairman could not be considered as having, for the purpose of the election, withdrawn; and that such election was void, as not having been determined by a majority of the guardians present.

AFTER the decision in the last case, Sir F. Thesiger obtained a rule *nisi* for a *quo warranto* information against Griffiths for exercising the office of clerk to the guardians.

It appeared on affidavit that the 38th article of the order of the Poor Law Commissioners (referred to in the last case) dated the 8th December, 1847, was as follows: "Every question at any meeting consisting of more than three guardians shall be determined by a majority of the votes of the guardians present thereat, and voting on the question; and, when there shall be an equal number of votes on any question such question shall be deemed to have been lost." And that article 155 was: "Every officer and assistant to be appointed under this order shall be appointed by a majority of the guardians present at a meeting of the board, consisting of more than three guardians, or by three guardians if no more be present." The election of Griffiths took place at a meeting of twenty-two guardians. The chairman of the guardians informed them, as soon as they were assembled, that he intended not to vote for any of the candidates (there being four) and should merely preside at the meeting as chairman. He did so, and took the votes.³ There were eleven for Griffiths, ten for ano-

¹ Coleridge, J., was absent on account of ill health; Wightman, J., in the Bail Court; Erle, J., at Guildhall.

² 17 Queen's Bench Reports, 164.

³ There was an objection to the manner of taking the votes, which the result of the present case makes it unnecessary to state.

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ther candidate, and none for either of the remaining two. Griffiths was declared to be elected, and afterwards entered upon the office.

Sir F. Kelly, with whom was *Pashley*, now showed cause. It will be objected that Griffiths was not elected, according to article 155, by a majority of the guardians present, the chairman having legally a vote, and not having given it. If the court is of that opinion, it will be useless to go farther. But a question may be, whether the chairman, after his declaration that he did not intend to vote, was not virtually absent for the purpose of the election.

[LORD CAMPBELL, C. J. There might perhaps have been a withdrawing of the chairman, like the Lord Chancellor going behind the wool-sack, or the speaker behind the chair; but if he actually continued present, the case is different.]

Sir F. Thesiger, contra, referred to stat. 12 & 13 Vict. c. 103, s. 19, which enacts: "That in the case of an equality of votes upon any question at a meeting of the guardians of any union or parish the presiding chairman at such meetings shall have a second or casting vote."

LORD CAMPBELL, C. J. We all think that in this case the chairman was a guardian present; and therefore the eleven did not constitute a majority.

PATTESON, COLERIDGE, and ERLE, Js., concurred.

The rule was made absolute; it being understood that no information should issue, and that Griffiths would resign within a week, performing the duties of clerk only until a new election.

Doe on the demise of the EARL OF ASHBURNHAM *v.* MICHAEL.¹

June 5, 1851.

Ejectment — Evidence — Entries in Steward's Books.

In ejectment, the question being whether the premises were parcel or no parcel of a manor, the lessor of the plaintiff produced from his muniments books purporting to be the books of J. V., steward to plaintiff's ancestor, the then Earl of A. In one of those books, J. V. was debited, in 1782, with the receipt of rent for the premises in question. The balance of the account for the half year was struck, but was not signed; under it was written in a different hand, "The above balance is accounted for in a general statement at the end of the year's account, ending Michaelmas, 1793, entered in a subsequent book." This entry was dated Feb. 18, 1795, and was signed by the then earl, and by "J. V., Jun." The

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balance was carried down in the account, and balances were struck in each half year; none were signed by J. V.; but under each was a similar entry signed by the earl and J. V., Jun., until the end of the last book, where was entered: "Balance due to J. V., 76*l.* 18th Feb., 1795.—The above account was this day settled; and the balance, 76*l.*, due thereon to J. V., Sen., was paid by the Earl of A. to J. V., Jun., and the vouchers delivered up to his lordship." This was signed by the earl and J. V., Jun. No evidence was given of the character or position of J. V., Jun., or that he was dead, or that he had ever existed:—

Held, that, inasmuch as the entry was produced from the proper custody, and purported to be fifty-five years old, it was not necessary to prove that J. V., Jun., was dead. And that, inasmuch as J. V., Jun., charged himself with the receipt of the last balance, and the entry of the payment of rent was part of the balance in that year which was carried down so as to form part of the last balance, the entry was admissible evidence of the payment of rent.

EJECTMENT for a cottage and premises.

On the trial, before Williams, J., at the last Brecknock Spring Assizes, it appeared that the premises were claimed as parcel of a manor of which the lessor of the plaintiff was unquestionably owner. Two books were produced from the muniments of the Earl of Ashburnham. These books purported to be the books of John Vernon, a steward to the then earl. The account was carried on in these two books till the end of the year 1793. Balances were struck each half year, which were always carried on into the next half year's account. In the account for the half year ending in June, 1782, in the first book, credit was given to the Earl of Ashburnham for rent received in respect of the premises in question; and the balance was struck and entered as follows: "26th July, 1782. Balance due John Vernon, 75*l.* 7*s.* 8*d.*" Neither this nor any other entry was signed by the steward; but underneath it was written, in a different hand, "The above balance is accounted for in a general statement at the end of the year's account ending Michaelmas, 1793, entered in a subsequent book."

Feb. 18, 1795.

ASHBURNHAM,
JOHN VERNON, Jun."

A similar entry was made under each consecutive half yearly balance; and at the conclusion of the second book the final balance was struck, and was entered thus:—

"Balance due to John Vernon, 76*l.* 19*s.* 7*d.*

"18th Feb. 1795. The above account was this day settled; and the balance, seventy-six pounds and nineteen shillings and seven pence, due thereon to John Vernon, Senior, was paid by the Earl of Ashburnham to the undersigned, John Vernon, Junior, and the vouchers delivered up to his lordship.

ASHBURNHAM,
JOHN VERNON, Junior."

These books were tendered in evidence by the lessor of the plaintiff. It was objected, that they were not signed by John Vernon, the steward, and that no evidence was given of the character of John Vernon, jun., who it was said might never have existed, or might still be alive.

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The learned judge received the evidence, and the plaintiff had the verdict.

In last Easter term, T. Allen obtained a rule *nisi* for a new trial on the ground of an improper reception of this evidence.

Evans and *Grove* now showed cause. The signature of John Vernon, jun., bears date fifty-five years before the trial; and the book in which it was found was produced from the proper custody. No further proof was necessary; *Wynne v. Tyrwhitt*, 4 B. & Ald. 376. Then John Vernon, jun., charges himself with the receipt of 76*l.* 19*s.* 7*d.* in 1795; and, from the manner in which the entry is made, proof that the balance in 1795 was correct, is proof that the balance in 1782, which is brought down in the account, is also correct. The case is not therefore like *De Rutzen v. Farr*, 4 A. & E. 53, where the person signing neither charged himself, nor appeared to have authority to charge his principal.

T. Allen, contra. John Vernon jun., may have been alive. The lapse of more than thirty years dispenses with the proof of his handwriting; but it does not show that he is dead, unless some search be made for him.

LORD CAMPBELL, C. J. I am of opinion that this rule should be discharged, as the evidence was properly received.

The first objection was that John Vernon, jun., was not shown to be dead. But I think, seeing that the entry bears date more than fifty years before the trial, proof of the death of the person signing it was unnecessary. Under such circumstances, in the absence of evidence to the contrary, it is to be presumed that he is dead. After the lapse of thirty years it is unnecessary to call an attesting witness. And, if the lapse of fifty-five years is not sufficient to afford a presumption of the death of a person signing an entry, it is difficult to say what period would suffice.

Then comes the question, whether this entry signed by John Vernon, jun., is evidence. As it is now explained, I think it is. I do not find fault with the decision in *De Rutzen v. Farr*, 4 A. & E. 53. As soon as we see that Protheroe, the clerk in that case, neither charged himself, nor was shown to have authority to make his principal liable, it appears that the decision was right. But here John Vernon, jun., does charge himself with the receipt of money for which he is personally accountable. Besides, if it were necessary to resort to that, I think we cannot reject the part of the entry which is signed by the late Earl of Ashburnham, and in which John Vernon, jun., is accredited in accounting with him.

PATTESON, J. This is a peculiar case, and must not be taken as an authority that any person signing an ancient document for another thereby makes it evidence. There were no contemporaneous signatures to the entries in 1782, charging the steward, John Vernon, sen., with the receipt of these rents; but they were brought down into a

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balance; and that balance was carried on in the account till, 1795, there was a general settlement, when the final balance was found in favor of the steward. Then John Vernon, jun., signs an entry in receiving that balance for John Vernon, sen., and Lord Ashburnham signs it also, treating John Vernon, jun., as a person accredited by and acting for the steward. This is a peculiar state of facts, very different from the case of *De Rutzon v. Farr*, 4 A. & E. 53.

John Vernon, jun., does not profess to charge himself with the receipt of the rents before 1782; but he does charge himself with the receipt of the balance in 1795; and that included these items.

COLERIDGE, J. I agree that under the special circumstances the books are properly received in evidence. These are not entries made by a mere stranger, and found by accident. They are regular books of considerable antiquity, and produced from the proper custody. In them appears the entry of a transaction, not merely of an accountant striking a balance, but of the lord and the accountant going back, and the accountant receiving the balance, so that the lord in effect accredits him as the party accounting.

ERLE, J., had left the court before the conclusion of the argument.

Rule discharged.

THE GUARDIANS OF THE STOKESLEY UNION v. STROTHER.¹

November 5, 1853.

Bond for due performance of duties of relieving officer — Liability of surety — Noncommunication of fact that a balance was due from the principal.

In an action against the surety on a bond conditioned for the faithful discharge of the duties of a relieving officer, the defendant pleaded and proved that at the time of the execution of the bond there was a balance of 206*l.* due from the principal, in respect of money which had been received by him as receiving officer, and that that fact was not communicated to him: —

Held, that, as the existence of that balance did not necessarily involve any imputation of misconduct against the relieving officer, it was not a material fact which the guardians were bound to communicate to the surety before he executed the bond.

This was an action on a bond in the penal sum of 150*l.*, conditioned for the due discharge, by one Robert Neesham, of the office of relieving officer; and, amongst other things, that in case of his resignation or removal he should account for and pay over all moneys, &c., in his possession by virtue of his office. Breach, that at the time

¹ 22 Law Times Rep. 84.

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of his removal he did not pay over, though required, a balance of 242*l.* odd. The defendant pleaded, thirdly, that before and at the time of the execution of the bond Neesham was indebted to the guardians in a sum of 206*l.*, being a balance due from him as relieving officer in respect of moneys which he had received by virtue of his office; and that the existence of that balance was unknown to him, and greatly increased his risk; and that if it had been communicated to him it would have deterred him from signing the bond; and that the guardians had fraudulently withheld the communication of the fact. At the trial, which took place before Erle, J., at Liverpool, it appeared that Neesham had been relieving officer for some years before the execution of this bond; but that, one of his sureties having died, he had been required to procure another. Accordingly he took the defendant to the clerk to the guardians, who accepted him as surety, and took the bond in the usual course. At that time the fact was that Neesham was accountable for 206*l.* which he had received by virtue of his office; but he was only required to render fortnightly accounts, and the audit only took place every half year. The defendant was examined as a witness, and swore that he would not have entered into the bond if he had been made acquainted with that fact. The learned judge told the jury that to absolve the surety from liability the other party must have been guilty of some falsehood or deception; and that he could not see any evidence of fraud in the present case. The jury found a verdict for the plaintiff.

Knowles now moved for a rule to show cause why there should be a new trial on the ground of misdirection. It is not necessary that there should be any active fraud, to absolve the surety; it is enough if the party who is to have the benefit of the suretyship simply omits to communicate any material fact calculated to affect the risk. The fact of there being a large balance against the officer at the time was very material in that point of view.

[LORD CAMPBELL, C. J. If he had been a defaulter at that time, probably it ought to have been communicated; but he was merely a debtor.

ERLE, J. There was always a balance against him to some amount.

WIGHTMAN, J. The very nature of the office would inform the defendant that Neesham must generally have money in hand, for which he was accountable to the guardians.]

At the trial it was assumed that there ought not to have been that balance against him.

[ERLE, J. The language of the auditor as to the 206*l.* was, that Neesham owed it.]

At all events, the direction was too general. The jury should have been informed that a mere omission to communicate a material fact would release the surety — *Railton v. Matthews*, 10 Cl. & Fin. 934; and they should have been asked whether this was a material fact.

LORD CAMPBELL, C. J. I think there was no misdirection in this

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case. The learned judge told the jury that there ought to be evidence of fraud or deception to support the plea; but that must be taken with reference to the evidence which had been given. Now there was no evidence that Neesham was a defaulter; he was shown to be a debtor to the amount of 206*l.*, which he may have held in the faithful discharge of his duty, and have honorably and punctually paid; and though *uberrima fides* is to be observed towards sureties, still, as in this case any man of common sense must have known that the relieving officer would have money in his hands for which he was accountable, I think the defendant, if he wished to know the amount of the balance, should himself have asked the question. If the balance had been 5*s.*, would the guardians have been bound to communicate that? Mr. Knowles does not say so. Then why, in the absence of any evidence to that effect, are we to presume that 206*l.* was more than he ought to have? I see no reason for us to conclude that he had been guilty of any default or misconduct at that time; and that being so, I think this is not a case in which it was necessary for the guardians spontaneously to communicate the fact. I by no means intend to lay down that a *suppressio veri* may not be enough to release a surety; but here the facts are quite consistent with the supposition that the principal had not at all violated his duty.

COLERIDGE, J. Taking the direction with reference to the facts of the case, I am of opinion that it was quite correct. Mr. Knowles says that fraud for this purpose may be proved by noncommunication of any material fact; and, as a general principle, that may be true; but every one who imputes fraud is bound to prove it, and if all the facts are consistent with the absence of fraud, then he fails. I think that is so here. Every fact is consistent with the supposition that Neesham was not a defaulter. As a relieving officer, he of course received money to distribute; and therefore, from the very nature of his office, he was sure to have money in hand; and without evidence upon the subject, I do not see how we can presume that he either had too large a sum in hand, or had kept it too long.

WIGHTMAN, J., and ERLE, J., concurred.

Rule refused.

Hirst v. Hannah.

ABRAHAM HIRST v. JOHN HANNAH.¹

June 17, 1851.

Warrant of Attorney to confess Judgment.

A warrant of attorney, to confess judgment as a security for advances, was attested in due form by an attorney, acting for defendant and as his attorney, and at his request, but who also acted, in the transaction, for the plaintiff. Defendant was informed that the attorney had been consulted by plaintiff.

The warrant was executed on 6th March, 1847. Judgment was signed on 19th July, 1847; and a *fi. fa.* shortly after issued, but was not executed. The plaintiff, after the judgment was signed, gave fresh credit to the defendant in the way of his trade. On 28th June, 1850, a levy was made. None of these facts were concealed. The defendant was adjudged a bankrupt on 29th July, 1850. A rule to set aside the warrant of attorney and all subsequent proceedings, was obtained in Trinity term, 1851:—

Held, that, by stat. 1 & 2 Vict. c. 110, s. 9, the attorney acting for the plaintiff could not act as attorney for the defendant, and that the objection, being made, must prevail.

Held, also, that the circumstances above stated, did not preclude the assignees of the bankrupt defendant from raising the objection.

Seemle, that lapse of time after execution levied, and other circumstances showing that the plaintiff was knowingly allowed to alter his position on the faith of a judgment thus obtained, may preclude the defendant or his representatives from raising the objection. *See quære.*

ATHERTON, in this term, obtained a rule nisi to set aside the warrant of attorney and judgment and all ulterior proceedings in this cause. From the affidavits on both sides it appeared that, on 6th March, 1847, the defendant executed a warrant of attorney to confess judgment in the Court of Queen's Bench for 4,000*l.*, with a defeasance stating that the judgment was to be to secure payment of 2,000*l.* by certain instalments, and that no execution was to be issued till default. The warrant of attorney was duly filed; and judgment was entered up on 19th July, 1847. Soon after, default was made in payment of the first instalment; and a writ of *fi. fa.* then issued, but execution was stayed by the plaintiff. On 28th June, 1850, a levy was made, and the goods seized. Hannah, the defendant, was adjudged a bankrupt on 29th July, 1850.

The present rule was obtained, on 28th May, in this term, on behalf of Hannah's assignees, on the ground that the warrant of attorney was not duly attested. It was attested by an attorney in due form; but the objection made was that he was at that time the attorney acting for the plaintiff. As to this, the facts appeared to be, that the witnessing attorney was acquainted with both Hirst and Hannah; that Hirst first consulted him as to the kind of security he could have, when he suggested a warrant of attorney; and that, afterwards, Hannah, of his own accord, came to the attorney, and requested him to prepare a warrant of attorney. Hannah now deposed expressly that he employed the attorney as his attorney; that in selecting him

¹ 17 Queen's Bench Reports, 383.

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he was not influenced by Hirst, but solely by his confidence in an old friend; and that he, and he only, paid the bill of costs; but it was not denied that, besides the previous consultation with Hirst, of which Hannah was informed by the attorney on their first interview, the same attorney received the warrant of attorney from Hannah and kept it for Hirst, and acted as Hirst's attorney in entering up judgment and issuing execution.

It further appeared that no concealment was practised; that the petitioning creditor, and assignee of Hannah, was aware of the judgment; and that Hirst sold Hannah goods on credit, in the ordinary course of business, after the judgment was signed, which, it was deposed, he would not have done, had he not believed the judgment was a valid security.

Watson, Cowling, and Hugh Hill now showed cause. The enactment in force on this subject is stat. 1 & 2 Vict. c. 110, s. 9, which enacts that "no warrant of attorney to confess judgment in any personal action, or *cognovit actionem*, given by any person, shall be of any force unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney." Now here the attesting witness is shown by the affidavits to have been retained by Hannah and expressly named by him.

[PATTESON, J. But he had been in previous communication with Hirst, and advising him on the matter; and, when the warrant of attorney was executed, it was given to him to keep for Hirst. Now in *Sanderson v. Westley*, 6 M. & W. 98, 100, it was said by my brother Alderson: "Wherever there is but one attorney present, it ought to be perfectly clear that he is not the plaintiff's attorney."

ERLE, J. In the present case it seems clear that the attorney was named by Hannah and was *bonâ fide* acting for Hannah; but it seems also that he was acting as attorney for Hirst.

LORD CAMPBELL, C. J. The question therefore must be whether, consistently with the decided cases, a warrant of attorney so attested is valid.]

In *Walton v. Chandler*, 1 Com. B. 306, the warrant of attorney was held valid, though the attesting attorney was in effect but the agent of the plaintiff's attorney.

[PATTESON, J. The defendant there had the opportunity of consulting a person not engaged for the plaintiff as the attorney here was.

LORD CAMPBELL, C. J. You cite the case as if the subscribing witness there was really acting under the plaintiff's attorney, and only nominally the defendant's attorney. But, whatever the facts might be, the court in *Walton v. Chandler*, 1 Com. B. 306, upheld

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the warrant of attorney on the ground that they thought the attesting attorney was in fact the attorney of the defendant only.]

In *Haigh v. Frost*, 7 Dowl. P. C. 743, the facts were exceedingly like the present.

[COLERIDGE, J. There the decision of the court proceeded on the express ground that in fact the attorney was not acting for the plaintiff.¹]

At all events, the present applicants cannot be permitted to raise the objection; it has been waived by a lapse of time. When a judgment has been signed, and execution has issued, those who came to set aside the judgment and so make all concerned in the execution trespassers by relation ought to do so promptly.

[PATTESON, J. Can this objection be waived? Is not the effect of the statute to make a warrant of attorney not properly attested a nullity?]

It may be so; and the judgment, founded on it, may be as avoidable as if it had been entered up without any authority at all; but the judgment is not void; and the court do not set it aside unless on the application of some person who has a right to make that application. Now the assignees of the bankrupt in their own time, and the bankrupt to whom they are privy, have knowingly allowed the plaintiff and the sheriff to act on the faith of the judgment; execution has been issued; fresh credit has been given; the parties have altered their position on the faith of this judgment; and the assignees are therefore precluded from taking the objection.

Peacock and *Hall*, contra, were desired by the court to confine their argument to the point whether the assignees of Hannah were, under the circumstances, at liberty to raise the objection. The objection to a judgment on warrant of attorney, that the warrant was void, cannot be waived; *Gripper v. Bristow*, 6 M. & W. 807. In *Pryer v. Swaine*, 2 Dowl. & L. 37, the warrant of attorney was set aside five years after it was executed. In *Cocks v. Edwards*, 2 Dowl. P. C. N. S. 55, the judgment was set aside, at the instance of the defendant's assignees, more than a year after the proceeds of an execution levied had been paid to the plaintiff.

[LORD CAMPBELL, C. J. If the objection may be taken, it must prevail; but it is urged against you that the defendant has taken fresh credit on the faith of this judgment, and, after he has done so, it would be against all justice to permit him or those privy to him to take any objection of which he was aware at that time.]

Even in such a case as is supposed, the statute is imperative. For the purpose of preventing frauds, it enacts that no warrant of attorney "shall be of any force" unless the defendant has at the time the advice of an attorney acting on his behalf. It must always be known to the defendant that he has not had this advice; and, in almost every case where the warrant of the attorney is to secure a loan, the advance is not made till after the warrant is signed. To establish the

¹ See this stated in the judgment, 7 Dowl. P. C. 746.

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rule therefore that a subsequent advance precludes the defendant from taking the objection would make the statute inoperative.

[ERLE, J. Suppose that a term of years were taken in execution, and the plaintiff, having bought it from the sheriff, proceeded to build upon the premises; do you say that the defendant might wait till 10,000*l.* was spent in improving them, and then come and as a matter of strict law set aside the judgment and execution?]

It is difficult to say that there are not possible cases estopping a defendant from raising the objection; but in the present case there are no advances beyond what had been agreed upon on the treaty for the warrant. The general credit given in the way of business is too remotely connected with the judgment to affect the question.

LORD CAMPBELL, C. J. I should be unwilling to lay it down that no lapse of time, or fresh dealings between the parties, could preclude the defendant from raising an objection of this sort; but, in the present case, I cannot say it has been so clearly made out that there have been any such fresh dealings, or alteration of the position of the parties on the faith of the judgment, as would warrant us in laying down, for the first time, that the assignees of the defendant are precluded from raising the objection.

Then, they being at liberty to make the objection, and the objection being made, it must prevail. It is clear that, though the attesting attorney was acting for the defendant, he was also acting for the plaintiff.

PATTESON, J. I think the words of the act very clearly show that the attesting attorney must be, not the attorney for the plaintiff, but another person. I think that under no circumstances, and in no case, can the attorney who is acting for the plaintiff be the attorney for the defendant within this statute; and, if a defendant chooses to say that he has confidence in the plaintiff's attorney, and will employ him and nobody else, he ought to be told that the warrant of attorney would be good for nothing, and that, if he persists, he cannot have the loan or the security.

But in this case it is urged that there were advances after the execution of the warrant of attorney, that there has been a lapse of time since the judgment was signed, and levy made, and that consequently, the parties are precluded from now raising the objection. And so I should have said if it had not been for the strong words of the act. But it is very difficult to separate the judgment from the warrant of attorney which the act says shall be of no force. And, if it may under any circumstances be set up, so as to be of force, I have great difficulty in saying when it is to be set aside.

COLERIDGE, J. I also think the rule must be absolute on the ground that a statute intended to prevent frauds, by requiring formalities, must be strictly observed or it is of no avail.

ERLE, J. I fear that formal provisions intended by the legislature

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to protect persons from frauds are too often perverted to an opposite purpose. But I am not prepared at present to lay down any rule, the application of which to the facts of the present case would prevent the parties before us from raising this objection.

Rule absolute.

REGINA v. POCOCK & others.¹

May 7, 1851.

Trustees of Road — Death occurring by their Neglect — Indictment for Manslaughter.

Trustees appointed, under a local act, for the purpose of repairing the roads in a district, with power to contract for executing such repair, are not chargeable with manslaughter, if a person, using one of such roads, is accidentally killed in consequence of the road being out of repair through neglect of the trustees to contract for repairing it.

WATSON, in this term obtained a rule to show cause why an inquisition, held on 6th January, 1851, before the coroner for the city of London and borough of Southwark, on the body of William Brent, and brought into this court by *certiorari*, should not be quashed for insufficiency.

The inquisition set out that the defendants and others of the said borough, on the 27th December, 1850, in the parish of St. George the Martyr, in the said borough, "upon the said William Brent" "feloniously did make an assault; and that the said" defendants and the said others "were then and there trustees under a certain act." &c., (10 Geo. 4, c. 128);² "that it thereupon became the duty of" defend-

¹ 17 Queen's Bench Reports, 34.

² Local and personal, public: "For watching, lighting, cleansing, and improving the roads, streets, and other public passages and places leading from the Stones End, Blackman Street, to the Fishmongers' Almshouses, Newington, and from thence, and from Stones End aforesaid, towards Blackfriars, Waterloo, and Westminster Bridges, and the parts adjacent or near thereto, within the parish of St. George the Martyr in Southwark, in the County of Surrey."

By sect. 1, the defendants and others are appointed trustees for (among other things) repairing the roads mentioned in the act, and preventing nuisances therein.

Sect. 16 enacts, "that it shall be lawful for the said trustees to cause the said several roads, streets, and other public passages and places within the said district (or such part or parts thereof only as to them, the said trustees, shall seem right) to be lighted and watched, and the part and parts of the now turnpike roads within the district, when the same shall come under their management and control, and shall cease to be turnpike roads, in such manner as they, the said trustees, shall think fit, and to exercise all such powers and authorities as shall be necessary for that purpose;" and "to contract and agree for the reparation, repairing, and amending, by paving or otherwise, of all parts of the said district which are now not deemed turnpike roads, and of the said part or parts of the said turnpike roads, whenever the same shall be under their management and control, and have by law to be repaired and amended by the trustees

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ants and the said others "to contract and agree for the reparation, repairing, and amending of a certain road hereinafter mentioned, and also to repair and amend and to cause to be repaired and amended the said road, to wit, a certain road commencing," &c., along, &c., to, &c., the said road being within a certain district called in the said act the south district of the parish of St. George the Martyr in the borough of Southwark, "when and so often as the same shall be necessary, with good, proper, and sufficient materials and things, and with such due reparation and amendment that the liege subjects of our lady the queen might go, return, pass, repass, ride, and labor with their horses, coaches, carts, and other carriages in, through, and along the said road, (the same then and there being a public road) as they ought and were wont and accustomed to do;" that defendants and the said others, being unmindful of their duty, "did then and there, contrary to their said duty, feloniously neglect and omit to contract and agree for the reparation, repairing, and amending the said road, and did also then and there feloniously neglect and omit to repair and amend and caused to be repaired and amended the said road, to wit, at" &c.; "whereby the said road then and there became and then and there was in a very ruinous," &c. "and decayed condition for want of such due reparation and amendment of the same; and that, the said William Brent being then and there riding upon a certain barrow drawn by a certain pony which he the said W. B. was then and there driving along the said road, the said" defendants and the said others, "by the feloniously neglecting and omitting to contract and agree for the reparation, repairing, and amending the said road, and the feloniously neglecting and omitting to repair and amend and to cause to be repaired and amended the said road, and by reason of the want of such due reparation and amendment of the said road as aforesaid, did thereby then and there feloniously cause one of the wheels of the said barrow then and there to drop into a certain large hole in the said road, and the said William Brent to be thereby then and there jerked and thrown with great violence from and off the said barrow down to and upon and against the ground there; and by means thereof the said" defendants, &c., did "then and there feloniously cause the said W. B. then and there to receive mortal fractures of eight of the ribs of him the said W. B.; of which said mortal fractures, and the sickness," &c., "thereby occasioned, the said W. B. did languish," &c., "and, on," &c., "the said W. B. of the said mortal fractures," &c. "did die: And so the jurors," &c., "do say that the said" defendants &c., "him the said William Brent, in manner aforesaid," &c., "feloniously did kill and slay, against the peace," &c.

under this act;" and by such contracts to stipulate for fines to be imposed on the contractors for neglect or default. Power is also given to the trustees, by sect. 49, and other sections, to levy and enforce payment of rates for repairing and maintaining the said roads, streets, &c.

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Charnock now showed cause. The defendants have been guilty of a felony in omitting to fulfil their statutory liability to contract and agree for the repairs of the road, inasmuch as the absence of such repairs has caused the death of a party using the road.

[LORD CAMPBELL, C. J. Surely this is different from a case of personal neglect; how can such an omission as this, on the part of trustees, amount to a felony?]

They have funds in their hands, for the purpose of repairing, which they omit to use; that is a neglect of their duty towards the public in respect of those funds; and such neglect is clearly a felonious offence, if it cause the death of any one. *Regina v. Haines*, 2 Car. & Kir. 363, 371. The objection raised in *Regina v. Barrett*, 2 Car. & Kir. 343, cannot be made in the present case; for there is a distinct allegation here that it was the duty of defendants to repair. The defendants will contend that the parish officers are liable for the neglect.

[LORD CAMPBELL, C. J. Where the inhabitants generally of a parish are bound to repair, can they be indicted for felony upon a death caused by their not repairing?]

It is not necessary to go so far; here an express duty is imposed by statute upon a particular body.

[LORD CAMPBELL, C. J. But that duty is the same which lay originally upon the inhabitants.]

The question is not whether there are sufficient grounds for a conviction in case of an indictment being preferred, or what would be the punishment in case of a conviction; but whether the inquisition is, on the face of it, bad.

[LORD CAMPBELL, C. J. To ascertain that, we must see whether, and how, the duty alleged in the inquisition arose.

ERLE, J. In order to make the neglect of duty an indictable offence, must it not, as in the cases cited of neglect in the management of mines, be immediately connected with the death?

WIGHTMAN, J. In the cases referred to, of neglect in managing mines, the person killed was not aware of such neglect. Why did the deceased here go along the road at all?]

There is nothing to show that he knew of its being out of repair.

Watson and *G. Hayes*, contra, were not heard.

LORD CAMPBELL, C. J. I am clearly of opinion that the inquisition is bad, and must be quashed. No doubt the neglect of a personal duty, when death ensues as the consequence of such neglect, renders the party guilty of it liable to an indictment for manslaughter; and the cases which have been cited in the course of the argument, and which establish that doctrine, are good law. I myself tried a prisoner for not taking proper care in managing the shaft of a mine. He intrusted the management of it to an incompetent person, who said at the time that he was incompetent. The prisoner was convicted; and I did not hesitate to inflict a severe sentence. But how can the principle I have stated apply to the present case? It cannot be said that the trustees are guilty of felony in neglecting to contract. Not only

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must the neglect, to make the party guilty of it liable to the charge of felony, be personal, but the death must be the immediate result of that personal neglect. According to the argument here, it might be said that where the inhabitants generally are bound to repair, and a death is caused as in the present case, all the inhabitants are indictable for manslaughter.

PATTESON, J. The inquisition is clearly bad. The allegation that the trustees feloniously neglected to repair cannot be supported.

WIGHTMAN, J. I am of the same opinion. The death here is not the direct consequence of the neglect charged.

ERLE, J. In all the cases in which a party has been indicted for manslaughter in causing death by his omission to perform a particular duty, I think the neglect of duty was immediately connected with the death as in the case of careless driving on a railway, or of not supplying an infant with food. The present case does not fall within this class. The inquisition is bad, and must be quashed.

Inquisition quashed.

REGINA v. BASSET and HOLLAND.¹

June 11, 1851.

Parishes — Adoption of the Provision of a Statute.

The ancient parish of St. Giles-in-the-Fields was divided (under acts of Anne and Geo. 1 and Geo. 2 for the building, &c., of new churches) into two parishes, St. Giles-in-the-Fields and St. George, Bloomsbury, which were made separate and distinct for all purposes except as to church, highway, and poor rates; and separate vestrymen were appointed for the new parish. By stat. 11 Geo. 4, and 1 Will. 4, c. 10, for regulating the affairs of the joint parishes of St. Giles and St. George, and of the separate parishes of St. Giles and St. George, the vestry of each parish was to be composed of forty-two persons, (besides the rector and churchwardens,) elected by the vestrymen duly qualified; each vestry was to appoint its own churchwardens and auditors, and make its own church rates, and to manage some other affairs of the separate parish; and the vestrymen of the two parishes were to be the joint vestry of the parishes, and to appoint overseers and directors and other officers to manage the relief of the poor of the joint parish, to make its poor rates, and to exercise other powers relative to the poor, and concerning the parishes jointly. Questions before the joint vestry, were to be decided by a majority of the vestrymen present: —

Held, that the parishioners of one of the parishes could not separately adopt the provisions of Sir J. Hobhouse's Act, 1 & 2 Will. 4, c. 60, for the election of their own vestry.

INDICTMENT, found at the Central Criminal Court, and removed into this court by *certiorari*.

The first count stated: That, after the passing and coming into

¹ 17 Queen's Bench Reports, 332.

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operation of a certain act of parliament made, &c., (1 & 2 Will. 4, c. 60, Sir J. Hobhouse's Act, "for the better regulation of vestries, and for the appointment of auditors of accounts, in certain parishes of England and Wales,") certain of the rate-payers of a certain parish in England, that is to say, of the parish of St. Giles-in-the-Fields, in the county of Middlesex, and within the jurisdiction of the Central Criminal Court,¹ desired that the said parish should come under the operation of the said act. And that a certain number of the rate-payers of the said parish, amounting at least to fifty parishioners of the said parish, that is to say, to 146 parishioners of the said parish, whose names are to the said requisition hereinafter in this count set forth, affixed, did, on a certain day between the 1st day of December, A. D. 1849, and 1st March, A. D. 1850, namely, on the 28th day of February, A. D. 1850, in pursuance and in conformity with the provisions of the said act, deliver a requisition, by them signed and describing their places of residence, to two of the churchwardens of the said parish then serving for the said parish, to wit, James Basset, late of the parish aforesaid, in the county aforesaid, laborer, and Henry Charles Holland, late of the parish aforesaid, in the county aforesaid, laborer, then being, and as, the churchwardens serving for the said parish, requiring of them as such churchwardens to ascertain, according to the manner in the said statute mentioned, whether or not a majority of the rate-payers of the said parish did wish and require that the said act and the provisions thereof should be adopted therein; which said requisition was and is in the words and figures following, namely, "To the churchwardens of the parish of St. Giles-in-the-Fields, in the county of Middlesex; we whose names are hereunto subscribed, being rate-payers resident in the said parish, and respectively rated or assessed to the relief of the poor thereof, do hereby require you, the said churchwardens, to ascertain and determine the adoption or non-adoption of an act of the second year," &c., "intituled 'An act,' " &c., (1 & 2 Will. 4, c. 60.) "Dated this 28th day of February, 1850." (Then followed the names and addresses subscribed to the requisition.) Nevertheless the said J. Bassett and H. C. Holland, so being such churchwardens as aforesaid, not regarding their duty in that behalf, but contriving and intending to render the said requisition of no effect, although they received the said requisition on the day on which it was so delivered as aforesaid, at the parish, &c., unlawfully did refuse and neglect to affix, or cause to be affixed, on the first Sunday in the month of March next after the receipt of the said requisition, namely, on the 3d day of March last past, a notice to the principal doors of every church or chapel within the said parish, specifying some day not earlier than 10 days, and not later than 21 days after such Sunday, and at what place or places within the said parish the rate-payers should be required to signify their votes for or against the adoption of the said act, or any notice whatsoever

¹ This averment was made where necessary in subsequent parts of the record, but will not be repeated in this abstract.

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ursuant to the said act; in contempt, &c., to the evil example, &c., against the form of the statute, &c., and against the peace, &c.

2d count. And the jurors, &c. That, after the passing, &c., (of stat. 1 & 2 Will. 4, c. 60,) certain of the rate-payers of a certain parish in England, namely, the parish of St. Giles, &c., (as before,) that is to say, certain persons who had respectively been rated to the relief of the poor for the whole year immediately preceding their acting as such rate-payers as hereinafter mentioned, and who had respectively paid all the parochial rates, taxes and assessments due from them at the time of so acting, except as in the said statute is excepted, desired, &c., (as before.) And that a certain number, &c., (as before,) whose names and residences are set forth in the requisition hereinafter in this count mentioned, did, on a certain day, &c.; as in the first count to the end, only adding, after the words "every church and chapel within the said parish," the words "that is to say, to the principal doors of all places of religious worship within the said parish according to the forms of the established church."

3d count. That the said J. Basset and the said H. C. Holland heretofore, to wit on, &c., (28th February, 1850,) and for a long time theretofore, were churchwardens of the parish of St. Giles, &c., and were on the day and year last aforesaid respectively serving the office of churchwardens of and for the parish aforesaid; and that certain, to wit, 500, of the rate-payers of the parish aforesaid, on, &c., at, &c., did desire that the said parish should come under the operation of a certain act, &c., (1 & 2 Will. 4, c. 60.) And that afterwards, to wit on, &c., at, &c., a certain number, &c., namely, 146 parishioners of the parish aforesaid, did, on a certain day between, &c., to wit on, &c., deliver a requisition, by them signed, and describing their places of residence, to each of them, the said J. Basset and H. C. Holland as such churchwardens then serving for the said parish as aforesaid, and requiring of them, the said J. Basset and H. C. Holland, such churchwardens as aforesaid, to ascertain, &c., (as in the 1st count); which said requisition then and there duly received by the said J. Basset and H. C. Holland, and each of them, as such churchwardens as aforesaid. That the first Sunday in the month of March next after the receipt of such requisition, was the 3d day of March, A. D. 1850; and that it became and was the duty of them, the said J. Basset and H. C. Holland, and each of them, as such churchwardens as aforesaid, on the said 3d day of March, A. D. 1850, at the parish aforesaid, &c., to affix, or cause to be affixed, a notice to the principal doors of every church and chapel within the said parish, specifying some day not earlier than ten days and not later than twenty-one days after such 3d day of March, and at what place or places within the said parish the rate-payers were required to signify their votes for or against the adoption of the said act. Nevertheless the said J. Basset and H. C. Holland, and each of them, so being such churchwardens as aforesaid, not regarding, &c., but contriving, &c., (as before, to "of no effect,") unlawfully, wilfully and contemptuously, did refuse and neglect on the said 3d day, &c., at the parish, &c., to affix, or cause to be affixed, a notice on the principal doors, &c., speci-

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fyng, &c., (as above,) or any notice whatsoever directed to be given by the said act in such behalf; contrary to the duty of them, the said J. Basset and H. C. Holland in that behalf, to the great damage of the said parish and the parishioners thereof, in contempt, &c., (as before.)

The defendants pleaded not guilty. On the trial, before Lord Campbell, C. J., at the sittings in Middlesex, after Trinity term, 1850, a special verdict was found, as follows:—

The jurors, &c., say: That the parish of St. Giles-in-the-Fields, in the county of Middlesex, was an ancient parish. That the commissioners acting under the authority of letters-patent granted by King George First, and by King George Second, and issued under the powers of the several acts of parliament passed for the building of new churches in and about the cities of London and Westminster, and the suburbs thereof,¹ did, according to the directions of the said acts, set out, appoint and declare, a certain portion of the ancient parish of St. Giles-in-the-Fields to be a new, separate and distinct parish to all intents and purposes whatsoever except as touching church rates, the relief of the poor, and rates for the highways, by the name of the parish of St. George, Bloomsbury; and did also appoint the rector, churchwardens, and thirty-six of the inhabitants of the said new parish to be the first vestrymen of such parish; since which period the said portion of the said ancient parish of St. Giles-in-the-Fields, so set out, appointed and declared to be a new, and separate, and distinct parish as aforesaid, has been known and distinguished by the name of the parish of St. George, Bloomsbury, and the residue of the said ancient parish has been known and distinguished by the name of the parish of St. Giles-in-the-Fields, and the affairs relating to the churches of the said separate parishes were managed by separate vestries of such parishes, the separate vestry of the said parish of St. George, Bloomsbury being constituted according to the directions of the said acts, until the passing of the act, &c., (11 Geo. 4 and 1 Will. 4, c. 10, local and personal, public, after mentioned.) And the jurors, &c., say that, up to and at the time of the passing of the said last mentioned act, no division had ever been made of the said ancient parish of St. Giles-in-the-Fields as to the maintenance and relief of the poor, according to the powers of the said church-building acts or otherwise; and the district of the same parish, so far as relates to the maintenance and relief of the poor, was commonly known and distinguished by the name of the joint parishes of St. Giles-in-the-Fields and St. George, Bloomsbury in the county of Middlesex, the same being coextensive with the said ancient parish of St. Giles-in-the-Fields, in the county of Middlesex, and comprehending the whole of the said separate parishes of St. Giles-in-the-Fields and St. George, Bloomsbury. And the jurors, &c., further say that the residue of the said ancient parish of St. Giles-in-the-Fields, from which the said parish of St. George, Bloomsbury was so separated as aforesaid, was and is the same parish

¹ See stats. 9 Ann. c. 22; 10 Ann. c. 11; 4 Geo. 1, c. 14; 3 Geo. 2, c. 19.

of St. Giles-in-the-Fields in the within indictment mentioned. And the jurors, &c., say that, before and at the time of the making and passing of the act, &c., (1 & 2 Will. 4, c. 60,) a certain local act of parliament made, &c., (11 Geo. 4 and 1 Will. 4, c. 10,) intituled "An act for the better regulation of the affairs of the joint parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, in the county of Middlesex, and of the separate parishes of St. Giles-in-the-Fields and St. George, Bloomsbury in the same county," and which, from the time of the making and passing thereof, has been in force in the parishes therein mentioned, continued, and was, and from thence hitherto hath been and still is, in force in the said parishes, the said separated parish of St. Giles-in-the-Fields, therein mentioned, being the parish of St. Giles-in-the-Fields in the within indictment mentioned; and the maintenance of the poor, and other affairs of the said parishes, have been from the time of the making, &c., of the said last mentioned act hitherto, and now are, regulated and carried on by and in obedience to the provisions of the said local act; and each of the said separated parishes has had, during all that time, its own particular churchwardens, appointed and acting under and in pursuance of the said local act.

And the jurors, &c.: That, after the making, &c., of the said act, (1 & 2 Will. 4, c. 60,) on a certain day between the 1st day of December, A. D. 1849, and 1st March, A. D. 1850, namely, on, &c., (28th February, 1850,) the said local act being then and there in force in the said parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, and the maintenance of the poor and other affairs of the said parishes being then and there regulated and carried on by and in obedience to the provisions of the said local act as aforesaid, a certain number being more than 50, that is to say, 146 persons, being then and there all parishioners of the said separated parish of St. Giles-in-the-Fields within mentioned, all of whom had been rated to the relief of the poor according to the provisions of the said local act, for the whole year then immediately preceding, and then and there paid all the parochial rates, taxes and assessments due from them respectively, and which had so become due at any time not within six calendar months next immediately preceding, being the same persons within in that behalf mentioned, did deliver a certain requisition, (being the same requisition within in that behalf mentioned,) then and there signed by them and describing their respective places of residence as therein mentioned, to the said J. Basset and H. C. Holland within mentioned, then and from thence until and at and after the 31st day of March, A. D. 1850, being and continuing the churchwardens of and serving for the said separated parish of St. Giles-in-the-Fields within mentioned, requiring of them, the said J. Basset and H. C. Holland, as such churchwardens, to ascertain, according to the manner in the said within mentioned act of King William 4, mentioned, whether or not a majority of the rate-payers of the said last mentioned parish, did wish and require that the said last mentioned act and the provisions thereof should be adopted in the said last mentioned parish; and which said requisition was then

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and there in the words and figures within in that behalf set forth; and the said J. Basset and H. C. Holland then and there received the said requisition from the said rate-payers. And the jurors, &c., say that, at the time of the delivery of the said requisition as aforesaid, a certain number exceeding 50 of the parishioners of the said separated parish of St. George, Bloomsbury, duly qualified in that behalf by rating and payment of rates, in like manner as aforesaid did deliver a similar requisition, similarly signed as aforesaid by the said last-mentioned parishioners, to the separate churchwardens of the said separated parish of St. George, Bloomsbury, requiring them to ascertain in manner aforesaid whether the provisions of the said last-mentioned act should be adopted in the said last-mentioned parish. And the jurors, &c., say that, before and at the times of the delivery of the said requisitions respectively, there was, and from thence hitherto has been, and still is, in each of the said separated parishes, a greater number than 800 persons rated as householders, and who had paid the rates for the relief of the poor within the year preceding that in which the provisions of the said last-mentioned act were so desired to be put in execution within the said parishes respectively as aforesaid. And the jurors, &c., say that the said J. Basset and H. C. Holland and the said churchwardens of the said separated parish of St. George, Bloomsbury, acting under legal advice, refused to act upon the said requisitions so respectively delivered to them as aforesaid; and the said J. Basset and H. C. Holland did not nor would, nor did nor would either of them, on the first Sunday in the month of March next after the receipt by them of the said requisitions as aforesaid, and which said first Sunday in March next after such receipt, was and fell on the 3d day of March, A. D. 1850, while the said J. Basset and H. C. Holland were, and continued churchwardens of, and serving for the last-mentioned parish as aforesaid, or at any other time, affix, or cause to be affixed, to the principal or any doors or door of every or any church or chapel within the said last-mentioned parish, or give, or cause to be given, in any manner whatsoever, a notice specifying some day not earlier than ten or later than twenty-one days after the said last-mentioned Sunday, and at what place or places within the said last-mentioned parish the rate-payers of the said last-mentioned parish were required to signify their votes for or against the adoption of the said within mentioned act of Will. 4, or any notice whatsoever for or towards the ascertaining in any manner whatsoever, whether or not a majority of the rate-payers of the said last-mentioned parish did wish and require that the said last-mentioned act and the provisions thereof, should be adopted in the said last-mentioned parish. But the said J. Basset and H. C. Holland did, at all times after the receipt by them of the said requisition, wholly omit to give any such notice, or in any manner to comply with the said requisition. But whether or not upon the whole matter, &c.; referring to the court in the usual form to determine whether or not the defendants are guilty or not guilty of the offence charged.

Crowder, for the crown. The question is, whether St. Giles's be

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or be not a parish to which Sir J. Hobhouse's Act is applicable. The special act by which that parish is governed is stat. 11 Geo. 4 and 1 Will. 4, c. 10, under which the parishes of St. Giles and St. George act as joint for the purpose of maintaining their poor, but are in other respects distinct; and they appoint their own vestries and officers respectively. The proceedings directed by stat. 1 & 2 Will. 4, c. 60, sects. 2, 3, 4, 5, are to take place, according to sect. 2, "when in any parish certain of the rate-payers thereof may desire that the said parish should come under the operation of this act;" and, in case of such desire being intimated by requisition from one fifth, or a number not less than 50, of the rate-payers, then, by sect. 3, the churchwardens "of the said parish" shall give the rate-payers notice to signify their votes on a stated day for or against the adoption of the act. St. Giles's is a parish within these clauses.

[COLERIDGE, J. Do you say that St. Giles's alone is to come under Hobhouse's Act, and not St. George's?]

Not St. George's, unless they desire to do so. The proceedings as to each must be separate.¹ By the interpretation clause, sect. 41, of stat. 1 & 2 Will. 4, c. 60, "parish" is "deemed to include any liberty, precinct, township, hamlet, tithing, vill, extra-parochial place, or any place maintaining its own poor." St. Giles's, it is true, does not entirely maintain its own poor; but it is a parish for other purposes, under Hobhouse's Act; and sects. 2 and 3 include any thing which may be called a "parish."

The earlier clauses of the local act provide for the separate action of the two parishes; sect. 9 forbids the exercising any functions of a vestry for either parish, except as they are in this act authorized to exercise them separately or jointly.² The vestry of each parish consists, by this act, sects. 7, 8, of forty-two persons, not including the rector and two churchwardens; sect. 12 provides that fourteen shall annually go out of office and be replaced by election, the mode of which is prescribed for each of the parishes.³ By sect. 15, no person

¹ Tomlinson, for the defendants, stated that a question might have been raised whether "St. Giles's" for the present purpose, did not consist of the aggregate of the two parishes; but that the verdict had been framed with a view of excluding this question.

[Lord Campbell, C. J. You argue on the assumption that Giles's is only half a parish.]

² Stat. 11 Geo. 4, c. 10, s. 9, local and personal, public, enacts: "That from and after the passing of this act, no public or open vestry shall be held within or for the said parish of St. Giles-in-the-Fields, or within or for the said parish of St. George, Bloomsbury, nor shall any powers or authorities be exercised by the inhabitants of the said parishes, separately or jointly, or any portion of them, in vestry assembled, save and except as hereinafter provided; and that all acts, powers, and authorities, which by the common law or statute law of this realm may be done and exercised, or are required to be done and exercised, by the inhabitants of a parish in open vestry or otherwise assembled, or by the vestrymen of any parish, shall, from and after the passing of this act, be done and exercised within the said parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, separately or jointly, as the case may be or require, by the vestrymen of the said parishes by this act declared and constituted, and hereafter to be elected, save and except as hereinafter provided."

³ Sect. 12 enacts: That on Tuesday next before the 20th January, 1831, and on the

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shall be entitled to attend or vote at any meeting of the inhabitants of either parish for the election of vestrymen of such parish, unless he shall be rated towards the relief of the poor of the said parishes on an annual assessment of 25 $\frac{1}{2}$ l. Sect. 17 enacts: "That the vestrymen of each of the said parishes shall severally meet in the vestry-room of their parish, or at some other convenient place within such parish," on a day, and between certain hours, which are specified, "and shall then and there proceed in the execution of the powers vested in them by this act;" and provision is made in this and the next clause for subsequent meetings. By sect. 24, "the vestrymen of each of the said parishes may from time to time elect and appoint such and so many treasurers, collectors, officers, agents, and servants as they shall think proper, and shall take such security from the treasurers, collectors, or other receivers of money to be appointed or continued under this act, for the faithful execution of their respective offices, as such vestrymen shall think proper, which securities may be taken either in the name of their vestry clerk or in the names of any five or more of such vestrymen;" they may suspend or remove such officers, &c., and elect others, and may order salaries to be paid them out of the money to be raised by such respective vestrymen under the powers of this act. Sect. 31¹ empowers the vestrymen of each

same day in every subsequent year, "the inhabitants of the parish of St. Giles-in-the-Fields, and the inhabitants of the parish of St. George, Bloomsbury, respectively, being duly qualified as hereinafter mentioned, shall and may severally meet in the vestry room of their parish, or in any other place within their parish, not being the church thereof, which the vestrymen of each such parish shall appoint, and such inhabitants of the parish of St. Giles-in-the-Fields shall proceed to elect fourteen persons, being duly qualified householders residing within the same parish, to be for three years, and until others shall be elected in their places, fourteen of the vestrymen of the parish of St. Giles-in-the-Fields, and such inhabitants of the parish of St. George, Bloomsbury, shall proceed to elect fourteen persons, being duly qualified householders residing within the same parish, to be for three years, and until others shall be elected in their places, fourteen of the vestrymen of the parish of St. George, Bloomsbury, in the room of the persons who by lot or rotation shall from time to time go out of office and cease to be vestrymen. Provided always, that every vestryman who shall be determined on to go out of office, or who shall by rotation go out of office, shall be capable of being re-elected."

¹ Sect. 31 enacts, "That it shall be lawful for the vestrymen of each of the said parishes, and they are hereby respectively required, to meet annually in Easter week, or within fourteen days after, and severally to elect two substantial householders within their parish (not being vestrymen) to be churchwardens of such parish, and also two substantial householders within their parish (not being vestrymen) to be sidesmen of such parish, to assist the churchwardens in the execution of their office, for the year then ensuing, and until others shall be appointed in their room;" provision is then made in case of death or removal; "and the respective churchwardens to be appointed by virtue of this act shall, when duly sworn, (in addition to the powers vested in and duties imposed upon them by this act,) have and be invested with all the powers and authorities, and shall be liable to perform all the duties, which churchwardens appointed by the course of common or ecclesiastical law are invested with or are liable to, so far as the same are not inconsistent with or are not varied or altered by this act; and the churchwardens of the said respective parishes shall, after their appointment and during their continuance in office, be, and they are hereby declared to be, vestrymen of the parish of which they shall be elected churchwardens by virtue of such their office."

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parish to elect churchwardens and sidesmen. And sect. 41 requires the vestry clerks, collectors, and all other officers, churchwardens, vestrymen, and persons concerned in the accounts of the parishes respectively, to attend the auditors of such respective parish on summons by them, or by the vestry clerk of such respective parish, and produce all books of account, &c.

Then follow the clauses providing for the joint action of two parishes. Sect. 42 enacts that "from and after the passing of this act, the vestrymen for the time being of the parish of St. Giles-in-the-Fields, together with the vestrymen for the time being of the parish of St. George, Bloomsbury, shall be, and they are thereby constituted and declared, the vestrymen of the joint vestry of the parishes of St. Giles-in-the-Fields and St. George, Bloomsbury; any thing in the said acts passed," &c., (10 Ann. c. 11, and 3 Geo. 2, c. 19,) "to the contrary notwithstanding." And, by sect. 43, "the vestrymen of the said joint vestry shall meet together in the vestry room of the parish of St. Giles-in-the-Fields, or at some other convenient place within the parish of St. Giles in-the-Fields or of St. George, Bloomsbury," on, &c., between the hours, &c., "and shall then and there proceed in the execution of the powers vested in them by this act;" provision is then made for subsequent meetings; no order to be made or proceeding taken (sect. 44) unless by concurrence of a majority of vestrymen present, the whole number present not being less than thirteen.¹

[LORD CAMPBELL, C. J. Under Sir J. Hobhouse's Act, sect. 23, the number of vestrymen, in parishes adopting the act, may be from 12 to 120 according to the population. Do you say that this democratic constitution may be adopted for the parish of St. Giles, while the former aristocratic constitution continues in St. George's? One vestry might very much outnumber the other.]

That is as the population of St. Giles's may be.

[LORD CAMPBELL, C. J. It might become a case of swamping.]

The local act then gives to the joint vestries the power of nominating overseers and directors of the poor of the joint parishes, sects. 58, 62, and treasurers, bankers, chaplains of the work-house, clerks, governors, matrons, collectors of poor rate, assistant overseers, and beadles, sect. 51, and of making a joint poor rate for the parishes, sect. 86. By sect. 27 of stat. 1 & 2 Will. 4, c. 60, the vestry elected in any parish under this act, "shall exercise the powers and privileges held by any vestry now existing in such parish." A proviso is added,

¹ Sect. 44 enacts, "That all orders and proceedings of the vestrymen of the said joint vestry in the execution of this act, shall be made and taken at a meeting or meetings to be held in pursuance hereof, and not otherwise (except in cases hereby otherwise particularly provided for); and no such order or proceeding shall be made or taken unless the majority of the vestrymen present at the respective meetings shall concur therein; and all orders and proceedings which are hereby directed to be made or taken by or before the said vestrymen, and all the powers and authorities hereby vested in them generally, shall and may be made, taken, and exercised by the majority of the vestrymen who shall be present at such meeting, the whole number of vestrymen present at any such meeting not being less than thirteen (except in cases where any other number is by this act named for any particular purpose.)"

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"that nothing in this act shall be deemed" "to repeal, alter, or invalidate any local act for the government of any parish by vestries, or for the management of the poor by any board of directors and guardians, or for the due provision for Divine worship within the parish, and the maintenance of the clergy officiating therein, otherwise than is by this act expressly enacted regarding the election of vestrymen and auditors of accounts." Sect. 73 of the local act provides "that the several laws relating to the overseers of the poor, and for the relief, maintenance, and employment of the poor, shall continue in force within the said parishes of St. Giles-in-the-Fields and St. George, Bloomsbury, except where the same are altered or are inconsistent with this act." And sect. 87 enacts: "That from and after the passing of this act, no rate for the relief of the poor shall be made or raised within the said parishes without the consent of the vestrymen of the said joint vestry, or by any other ways or means than are directed by this act; and all moneys arising by or from the rates to be made by virtue of this act for the relief of the poor, shall be and are hereby vested in the vestrymen of the joint vestry of the said parishes, for the joint use of the two parishes;" the overplus after paying costs of collection, and taxes, costs, &c., charged by law upon the poor rates, to be applied by the directors in paying for "the relief, maintenance, and employment of the poor of the said parishes."

Under the local act, therefore, these are two parishes, jointly maintaining their poor; each providing for its own poor and that of the other. Each, then, is a "parish" within the broad sense given to that word by stat. 1 & 2 Will. 4, c. 60, s. 41.

[COLERIDGE, J. As you contend, if the whole of St. George's parish were unwilling, they might yet have this act put upon them.

LORD CAMPBELL, C. J. And be ruled by the vestry elected under it.

COLERIDGE, J. Yet the principle of Hobhouse's Act is that the adoption of it shall be voluntary.

LORD CAMPBELL, C. J. In point of law could it be adopted for the joint parishes, if both were willing?]

It could.

[LORD CAMPBELL, C. J. Then it can hardly be applied to a half.

COLERIDGE, J. If both, by majorities of the rate-payers, concurred in adopting the act, would it be a place "maintaining its own poor" within stat. 1 & 2 Will. 4, c. 60, for which such adoption would be available?]

It would seem that each parish, individually, ought to adopt it. The directions in sects. 2 and 3, relative to the "churchwardens of the said parish," are hardly consistent with the supposition that the two constitute one for the purpose of that act. The whole question turns on the meaning of the word "parish" in Hobhouse's Act; whether it must necessarily mean a place maintaining its own poor individually and entirely. Such a construction would exclude many parishes from the benefit of the act.

[LORD CAMPBELL, C. J. Incorporated parishes are very different from this, which is an ancient parish subdivided.]

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The argument that a disproportionate number of vestrymen might be elected from St. Giles's, is not conclusive.

[LORD CAMPBELL, C. J. It has weight only when we are considering the probable intention of the act.]

The intention was to give a broad basis.

[LORD CAMPBELL, C. J. With consent of those concerned; that is, according to the will of a majority of rate-payers within the area. If the act were introduced into both parishes as constituting one, each part would have the influence it ought under Hobhouse's Act; if it is adopted only by half, one half has not that influence, and is subject to the other.] •

The other may adopt the act also. If the parishes could legally adopt the act together, there would be no disadvantage; this, however, does not seem to be an admissible construction. The whole was originally St. Giles's parish; but that does not seem material to the present question.

[LORD CAMPBELL, C. J. No.]

Tomlinson, contra, was stopped by the court.

LORD CAMPBELL, C. J. Whether Sir John Hobhouse's Act could apply to the whole of that which was the ancient parish of St. Giles-in-the-Fields, we are not called upon to say; to the half it clearly cannot. I think this never was contemplated by the legislature; and it would be most unjust to force upon St. George's parish the necessity of acting with a body elected by St. Giles's under a totally different constitution, which might nullify all their influence and annihilate their rights, and, as to the making of rates and for other purposes, subject them entirely to the tyranny of the new power. I think that, with regard to Hobhouse's Act, the present parish of St. Giles is a parish and not a parish. It is one half of a parish; and this half cannot force a new constitution upon the other. I have no hesitation in saying that our judgment ought to be for the defendants.

COLERIDGE, J.¹ I am of the same opinion. The legislature, in passing stat. 1 & 2 Will. 4, c. 60, contemplated an entire body, and deemed it essential that the change to be effected by the act should not take place unless assented by two thirds of the body. Here the attempt is to bring under the operation of the act a whole body which has neither assented to nor been consulted upon it, and may be entirely opposed to it.

ERLE, J. This proceeding could be supported only on a supposition that the parishes of St. Giles and St. George, which are in effect one parish for the purpose of maintaining their poor, were coöperating to obtain the benefit of Sir J. Hobhouse's Act. At present the rights

¹ Patteson, J., left the court when the case was called on, being a rate-payer of one of the parishes.

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of the two, as jointly maintaining their poor, are regulated by the local act, 11 Geo. 4 and 1 Will. 4 c. 10. If the half of that which is to be considered as one parish under the local act could take the benefit of Hobhouse's Act alone, it would very materially affect the rights of the other half in their vestry, they remaining subject to the statute of 11 Geo. 4. It is clear that the parishioners of St. Giles's have no right to affect the parishioners of St. George in this manner against their will. The claim set up is in effect a claim by one half of a parish to take the benefit of Sir J. Hobhouse's Act without the consent of the other, and cannot be maintained.

Judgment for defendants.

ROBERT BIDDULPH against CHARLES MORTON CHAMBERLAYNE.¹

June 12, 1851.

Libel — Justification.

Action for a libel. Plea justifying, as true, part of the libel, which comprised several libellous allegations. Replication, *de injuriâ*.

On the trial, the judge asked the jury to find separately as to the truth of the several allegations justified. The jury found that some of the allegations were not true, and that others, forming an important part of the libel, were true. A general verdict was entered for the plaintiff. A judge made an order that the master should not allow plaintiff the costs of the witnesses called only to disprove that part of the plea which was found to be true. On a motion to rescind this order : —

Held, by Lord Campbell, C. J., Patteson and Coleridge, JJ., that the order was improper, the issue being indivisible.

Erle, J., dissentiente.

GREAVES, in the present term, obtained a rule *nisi* to rescind an order of Patteson, J., made in this cause, that the master on taxation disallow the costs of such witnesses for the plaintiff as were called only to disprove the existence of a nuisance.

The action was for a libel, contained in a letter published in a newspaper, stating as follows: That defendant had complained, a twelvemonth before, to the plaintiff that an open ditch and cesspools, on the plaintiff's premises, near Ledbury, were injurious to public health, and a nuisance; that plaintiff, after fencing with defendant's questions, refused to do any thing; that proceedings were taken before the magistrates, under stat. 11 & 12 Vict. c. 123, to remove the nuisance, which were defeated by technical objections on the part of plaintiff; that the ditch was a nuisance, which for many years had occasioned typhus fever in the neighborhood; that plaintiff had full notice of this, and that the nuisance still continued unabated. The

¹ 17 Queen's Bench Reports, 351.

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defendant pleaded, (among other pleas,) one which was so worded as to leave it ambiguous whether it was confined to the part of the libel which imputed that defendant had maintained a nuisance, or was pleaded to the whole of the libel of which the substance is above set forth. It averred the truth of each of the facts above stated. Replication, *De injuriâ*.

On the trial, before Patteson, J., at the Croydon Spring Assizes, 1851, the bulk of the evidence called on each side, was as to the nature of the ditch in question, and the prevalence of typhus fever in its vicinity. The jury, in answer to the questions put by the learned judge, found that the ditch was a nuisance, but that other statements in the libel, the truth of which was averred in the plea, were not true. The learned judge directed a verdict for the plaintiff on this issue, with leave to defendant to move to enter a verdict for him in case the court should be of opinion that the plea, so far as material, was confined to that part of the libel proved to be true.

Whateley, in Easter term last, obtained a rule *nisi* accordingly, which was discharged in that term.

PATTESON, J. then made the order in question.

Whateley and *Phipson*, now showed cause. The Plaintiff, having by the replication, *De injuriâ*, put the whole plea in issue, was, as this court has determined in the present cause, entitled to the verdict, unless the defendant proved the truth of every material allegation in the libel to which it is pleaded; (see *Regina v. Newman*, 1 E. & B. 558; s. c. 18 Eng. Rep. 113;) but, though the plea is for the purpose of the verdict entire, it is not indivisible for every purpose. A plaintiff always has the power to divide such a plea as this, by admitting such of the allegations as are true and replying *De injuriâ absque residuo causæ* to the rest; if he does not choose to adopt this course, he should not be allowed the costs of those allegations which he has unnecessarily and untruly put in issue.

[LORD CAMPBELL, C. J. It would be equitable in the present case to deprive the plaintiff of those costs. The sole question is, has the court a discretionary power to do so, the issue not being divisible on the record?]

For the purpose of costs, each distinct allegation may be viewed as a distinct issue. No witnesses ought to be allowed unless material; how can it be said that witnesses called only to prove a fact which was disproved can be material? *Prudhomme v. Fraser*, 2 A. & E. 645, goes much farther than is required. There the libel was considered so far divisible that the defendant was allowed the costs of that part not proved by the plaintiff; here it is only asked that the plaintiff may not have those costs. That case also shows that the fact of the verdict being entered generally is not conclusive as to costs. So also does *Welby v. Brown*, 1 Exch. 770. The jury in this case might have returned a special verdict, finding some averments

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in the plea one way and some the other. Every material allegation is in substance, though not formally, a separate issue.

Greaves, contra. The jury are sworn to try the issue joined, not to try every separate fact; but, if the rule as to costs, now contended for, is to apply, it becomes a matter of right to have the verdict of the jury on each separate averment, as much as where there are separate issues.

[LORD CAMPBELL, C. J. The rule might be, that, where the judge in his discretion thought fit to ask the jury to find the facts separately, the costs should follow their finding, without laying it down either that the party should have a right to require that the opinion of the jury should be taken separately, or that, where the facts were not found separately, the master on taxation should enter on the inquiry.]

No such rule has ever been laid down; and it would be very inconvenient if such a rule did exist. The judge at Nisi Prius often finds it convenient to ask the jury specific questions in order to raise a point of law for the court; and it would be hard if his doing so should affect the costs. Besides, the court have not jurisdiction to deprive the plaintiff of costs on a verdict on an indivisible issue; if the issue be such that the other side has, or might have, a judgment, the case is different. Thus, where the issue is divisible and the defendant may have a judgment as to part, as in *Williams v. Great Western Railway Company*, 8 M. & W. 856, or where from the actual form of pleadings he has a judgment, as in *Daniel v. Barry*, 4 Q. B. 59, the costs are disallowed; but not otherwise. *Anderson v. Chapman*, 5 M. & W. 483.

LORD CAMPBELL, C. J. I am of opinion that the rule must be made absolute.

The question raised is whether, with respect to the allowance of costs, an issue can be considered distributive, which cannot be divided on the record because it is taken on one entire plea. I feel great difficulty in seeing how it can be done. In all the cases cited the issue might have been divided on the record, and a finding might have been entered on one part of it for the plaintiff, and on the other for the defendant; but, where, as in the present case, the plaintiff is entitled to the verdict on the entire issue, it is difficult to see how, for the purpose of taxation of costs, we can distinguish between the several allegations in the one entire plea. That has never been done hitherto; and it would often have been done, but for the inconvenience of the course. It is not proposed in this case that the master shall on taxation always inquire whether the different allegations were proved. The defendant's counsel ask that the rule should be confined to cases in which the judge has put specific questions to the jury, and they have found that certain allegations have not been proved. But, if that were the rule, it would be a matter of accident whether the plaintiff got these costs or not, unless it were to be established that the defendant had a right to require the judge to put the

allegations to the jury separately; which would, I think, be most inconvenient. In the particular case justice would be done by adhering to my brother Patteson's order: but I think it would be an excess of our jurisdiction and would lead to much inconvenience in other cases.

PATTESON, J. This question could not have arisen unless I had put specific questions to the jury as to the different allegations in the plea; for, if I had left the issue generally to the jury and they had found a general verdict, it could not have been known what allegations they thought disproved. Now the questions were put by me quite *alio intuitu*; and I think the fact that such questions were put ought not to affect the costs. In this case there is one single issue, indivisible so far as regards the verdict. It is contended that the issue may nevertheless be divisible as to costs. It is quite clear that it is not divisible for the purpose of giving the costs of those allegations which were disproved to the defendant; but it is urged that, though not divisible so as to give the defendant those costs, it may be so divisible as to deprive the plaintiff of them. I think the precise question has never before been raised, as the attempt has always been to give costs, not merely to deprive the other side of them; but I am of opinion that we ought not to establish the rule as asked for now. I made the order with a view to justice; I am now convinced that, to do so, I rather wrested the law, and was wrong; and that the present rule must be absolute.

COLERIDGE, J. The safe course is to limit the rule of Hil. 2 W. 4, L. 74; 3 B. & Ad. 385, to issues which may be found on the record. That I think is the meaning of the general rule made by all the courts for the purpose of rendering the practice uniform; and, if it is to be extended in the manner now sought, it ought to be done by a general rule of all the courts. That alone I consider a sufficient reason for setting aside this order. But, further, I cannot but think that, if, to advance what we supposed to be the justice of this case, we were to extend the rule as asked, we should lay down a most inconvenient rule of practice. If an issue, indivisible for the purpose of the verdict, may be divided for the purpose of costs, I do not know where to stop; the party would have at least an equitable right in all cases to ask the judge to put the allegations separately; which would be very inconvenient. But that is not all: it would follow that the master must as it were re-try the cause, so as to ascertain the materiality of each witness as to each allegation. I think it much better to adhere to the rule than wrest it for the supposed justice of the case. I say *supposed* justice; for it must be remembered we have not complete knowledge of all the circumstances.

ERLE, J. My opinion is not material: but I should have thought the principle of *Prudhomme v. Fraser*, 2 A. & E. 645, was a precedent for this order. The libel in the present case contained several libellous allegations, and was in effect several libels. The defendant

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pleads a plea justifying both the allegation that there was a nuisance, and those that the plaintiff had otherwise misbehaved himself. The plaintiff puts in issue the whole plea; which I think was, in substance, one plea to two causes of action. The judge had a right, if he thought proper, to ask the jury what their opinion was as to each allegation separately; and the jury had a right, if they pleased, to return a special verdict, finding as to each allegation separately; and, though perhaps in strictness they ought not to be directed to consider how much of the libellous matter was true when estimating damages, I suppose there is no doubt the jury would do so in fact. Then, the issue being divisible for all these purposes, I should say that, according to the principle of *Prudhomme v. Fraser*, 2 A. & E. 645, the issue might be considered divisible for the purpose of taxation; and that we might refuse to allow the plaintiff the costs of attempting to negative that part of the plea which was proved.¹

Rule absolute.

LIPSON v. HARRISON.²

/ November 3, 1853.

Salvage — Action at Common Law — Services rendered by a Seaman by the order of his own Captain.

In an action for salvage services, it appeared that the plaintiff, being a common sailor, was ordered by the captain of his own ship to go in a boat with others, for a distance of fourteen miles, to the assistance of another vessel, which was stranded on the bar of a river, and to place himself under the command of the captain of that other vessel: —

Held, that, under those circumstances, he could not maintain an action against the owner of the vessel saved, for the personal services which he had rendered.

THIS was an action for money payable for the salvage of the bark Lady Worsley, of which the defendant was owner, and which was stranded on the bar of the Bonny River, on the coast of Africa, on the 14th January in the present year. At that time the plaintiff was a common sailor on board the Swiftsure, which was then lying at anchor in the river, about fourteen miles from the bar. The master of the Lady Worsley having made a communication to the captain of the Swiftsure, the latter ordered the plaintiff and others of his men to go to the assistance of the former vessel; and accordingly they went in three boats, accompanied by the captain of the Lady Worsley, under whose orders they were directed to place themselves; and,

¹ See stat. 15 & 16 Vict. c. 76, ss. 77, 81, 223. No general rule apportioning the costs of issues has yet been made under sect. 223; so that it is apprehended that, where there is a general denial of a pleading, the costs of all the allegations, whether proved or disproved, must follow the finding, as before the statute, according to the principal case.

² 22 Law Times Rep. 83.

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with their assistance, the bark was got off the bar and saved. At the trial, which took place before Wightman, J., at Liverpool, it was objected on the part of the defendant that an action would not lie at common law for salvage; secondly, that, if at all, the action should be by the principals; or, thirdly, that the action ought to be by all the salvors; and the learned judge, holding that the action could not be maintained, nonsuited the plaintiff.

Atherton now moved, by leave of the learned judge, for a rule to show cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff. First, an action may be maintained at common law for salvage services. It is expressly laid down that the salvor has a lien upon the property saved for his compensation, the amount of which may be ascertained by a jury in an action by the salvor against the proprietor: *Abbott on Shipping*, 556; *Hartford v. Jones*, 1 Lord Raym. 393; *Newman v. Walters*, 3 Bos. & P. 612. In the last mentioned case the first count was the same as here; but there was also a count for work and labor.

[WIGHTMAN, J. But the difficulty is that the plaintiff was ordered to go, and could not have gone without the permission of his own captain.]

That raises the second point, that the action should have been brought by the principals; but, upon reference to the decisions of the Admiralty Court, it appears that that court looks primarily to the actual salvors as the persons entitled: *The Calypso*, 2 Hagg. 218; *The Thetis*, 3 Hagg. 48; *The Baltimore*, 2 Dods. No doubt there is a more convenient procedure in the Court of Admiralty, because that court determines in one suit the shares to be received by all the parties entitled; but each individual salvor has a right of action for his own fair proportion. The order of the captain makes no difference in this case; because the plaintiff, in going, was still a volunteer. He was not bound to obey such an order. His ship was at anchor waiting for a cargo; and his captain had no authority to order him to leave that ship and engage in a perilous service at a distance, for the preservation of another ship. Thirdly, an action by all jointly could not be maintained. There was no joint contract.

LORD CAMPBELL, C. J. I am of opinion that there ought to be no rule in this case. This is an action at law founded on a contract, and to maintain it some evidence must be given of a contract; it must be shown that there was a contract between the plaintiff and the owner of the *Lady Worsley*, to remunerate him for his services on this occasion; but it seems to me that the facts negative any such contract. The *Lady Worsley* being stranded on the bar of the river Bonny, her captain comes to the captain of the *Swiftsure*, who orders the plaintiff amongst others to go and render assistance. Three boats are employed in the service, and the plaintiff is in one of them. How can it be said that he was a volunteer adventurer. The volunteer adventurer is the person to be entitled; but the plaintiff was acting

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under the orders of his own captain, and apparently according to his own notion in the performance of his duty as a seaman; and he was put under the command of the captain of the *Lady Worsley*. Under these circumstances, it is impossible to say that any contract arose between the plaintiff and the owner of the *Lady Worsley*. I do not by any means go so far as to say that in a court of common law there can be no action for salvage; but I am clearly of opinion that in this case no action can be maintained; and it is certainly contrary to convenience that such actions should be brought here, because by the course of procedure in the Admiralty Court justice may be much more completely done in that court.

COLERIDGE, J., concurred.

WIGHTMAN, J. The proceedings in the Admiralty Court do not depend upon contract; and the only authority for the plaintiff is the case of *Newman v. Walters*; but in that case there was some evidence of a contract. Here I think there is none; and I proceed upon that ground without giving any opinion whether an action at law for salvage may or may not be maintained. All that the plaintiff did was under the orders of his own captain; and without his permission at all events he could not have done any thing. To hold that there was a contract with every member of the boats' crews engaged in this service would, I think, lead to the most inconvenient consequences, and would not be warranted by any authority.

LORD CAMPBELL, C. J., mentioned that Erle, J., who had left the court during the argument, concurred in the decision.

Rule refused.

STEVENS v. LEGH.¹

November 5, 1853.

Horse — Sale — Fraud — Auctioneer — Liability.

A sent a horse to B, an auctioneer, to be sold without warranty on certain false representations, the falsehood of which were concealed from B. B sold the horse accordingly, and received the price; but before he paid over the price to A, the purchaser discovered the fraud, rescinded the contract, gave B notice not to pay the price to A, and demanded it back from B:—

Held, a defence to an action by A against B to recover the price as money had and received to A's use.

THIS was an action to recover 17*l.* 6*s.* 6*d.* from the defendant as money had and received to the plaintiff's use.

¹ 22 Law Times Rep. 84.

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The defendant pleaded that the plaintiff sent a horse to defendant, an auctioneer, to sell on plaintiff's account — to be sold without a warranty, but on certain representations that were false to the plaintiff's knowledge, such falsehood being concealed from the defendant; that the defendant sold the horse for 17*l.* 6*s.* 6*d.* on those representations without any knowledge of their being untrue; that afterwards the purchaser discovered the fraud, rescinded the contract, and, before the money was paid over to the plaintiff, gave the defendant notice not to pay over the money, and claimed the money as belonging to him the purchaser.

At the trial before Talfourd, J., at the Bristol Assizes, it appeared that the plaintiff was a horse-dealer, and the defendant an auctioneer, and that the horse was taken to the defendant by one Gill, to be sold by auction, upon the false representations that the horse came from the country for sale, its owner not having any further occasion for it; that it was a useful horse and had been worked in harness up to the time when it was sent for sale; and that the plaintiff concealed from defendant certain defects, rendering the horse worthless, and totally unfit and improper to be offered for sale. The jury found the above facts, and also the averments in the plea, to be proved, and thereupon the learned judge directed a verdict for the defendant.

Kinglake, Sergt., now moved for a new trial, on the ground that the plea was no answer to the action. In the sale the defendant was acting as agent to the plaintiff, the owner of the horse; and upon receipt of the purchase-money, it was money in the defendant's hands to the use of the plaintiff. The defendant was an innocent party in making the representations, and not liable to the purchaser for the fraud. A mere notice to the agent of the rescission of the contract, and a demand of the money back, does not give a right of action against the innocent agent. In *Murray v. Mann*, 2 Exch. 538, the plaintiff sold a horse for the defendant, and received the price, and the purchaser afterwards rescinded the contract, on the ground of fraud, and was repaid the purchase-money; and it was held that in an action by plaintiff for the keep of the horse, defendant could not set off the price as money received for his use. In that case there was fraud in the agent, and the purchaser had a right of action against him.

LORD CAMPBELL, C. J. The case of *Murray v. Mann* is in point, and the principle there stated applies *a fortiori* to the present case. This plea is a good plea; it alleges that the plaintiff had concealed facts from the defendant, and had been guilty of a gross fraud upon the purchaser. The facts of the plea were proved, and were found to be true and also that while the money was in the hands of the auctioneer the purchaser discovered the fraud, rescinded the contract, and gave notice to the auctioneer not to pay over the money to the plaintiff. Under these circumstances, if the auctioneer was to be held liable to pay over the money to the vendor, it would be a discredit to the law of England; for then a person would be entitled to an advantage in consequence

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of his own fraud, while the innocent agent posed to liability to the person committing the fraud. The auctioneer, after receiving notice from the purchaser, had paid over the money to the plaintiff, the auctioneer would have been liable to an action at the suit of the purchaser. This was not money in the hands of the auctioneer received to the use of the plaintiff, but to the use of the purchaser, because the fraud vitiated the contract. It was money received through the fraud of the plaintiff, and in consequence of a contract made through the means of that fraud. The purchaser rescinded the fraudulent contract, and from that moment it became money in the auctioneer's hands to the use of the purchaser.

The other judges concurring,

Rule refused.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER,

DURING THE YEARS 1853 - 54.

READ *v.* COKER.¹

June 1, 1853.

Assault — Notice of Action — Acting in pursuance of Statute — Bona Fides.

The defendant ordered the plaintiff to leave his shop, and on his refusal, sent for some men, who mustered round the plaintiff, tucked up their sleeves and aprons, and threatened to break his neck if he did not go out, and would have put him out if he had not gone out :

Held, an assault upon the plaintiff.

The 7 & 8 Geo. 4, c. 30, s. 41, (the Malicious Trespass Act) enacts, that in all actions for any thing done in pursuance of the act, notice in writing of such action shall be given to the defendant one month before action brought. The 7 & 8 George 4, c. 29, s. 75, (the Larceny Act,) is to the same effect.

The defendant was sued (in the third count) for having given the plaintiff into custody on a charge of doing wilful damage to the defendant's property, and (in the fourth count) for having given him into custody on a charge of larceny. The jury found that the plaintiff had not, on either occasion, committed the offence with which he was charged, but that the defendant, on both, *bonâ fide* believed that he had : —

Held, as to each count, that the defendant was entitled to notice of action ; and that it was not necessary for him to show that he knew of the above acts.

THE first count of the declaration was for an assault alleged to have been committed by the defendant on the plaintiff, on the 24th

¹ 22 Law J. Rep. (N.S.) C. P. 201 ; 17 Jur. 990 ; 1 Common Law Rep. 746.

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of March, by thrusting him out of a workshop. The second count was for a similar assault on the 22d of April, and for imprisoning the plaintiff without reasonable cause. The third count was for a second assault and false imprisonment on the same 22d of April. The fourth count was for an assault and false imprisonment on a charge of felony on the 27th of April.

Plea — not guilty by statute. Issue thereon.

The cause was tried, before Talfourd, J., at the Sittings for London, on the 29th of April last, when it appeared that the plaintiff occupied, as weekly tenant to one M., a workshop, in which was fixed machinery, including a steam-press and turning-lathe. The plaintiff having got into difficulties, an arrangement was made between him, M., and the defendant, whereby, as the jury found, the plaintiff and the defendant became joint owners of the machinery, and the defendant sole tenant of the premises, and it was agreed that the plaintiff should superintend the business of paper-staining, carried on upon the premises, for the defendant, at weekly wages. The defendant being dissatisfied with the plaintiff, discharged him on the 22d of March. The plaintiff having come upon the premises on the 24th, the defendant ordered him to leave, and on his refusal, sent for some men, who "mustered round the plaintiff, tucked up their sleeves and aprons, and threatened to break his neck if he did not go out, and would have put him out if he had not gone out." This was the assault complained of in the first count. The learned judge told the jury that if they thought the defendant and his men had, at the time they threatened the plaintiff, the intention and present ability to inflict violence upon him, then the evidence proved an assault. The jury returned a verdict for the plaintiff, damages one farthing, and leave was reserved for the defendant to move to enter the verdict for him.

In support of second count, it was proved that on the morning of the 22d of April the plaintiff went again upon the premises, and began to pull down the printing-press in the workshop, whereupon the defendant's servants, in the defendant's absence, and, as the jury found, without his authority, gave the plaintiff into custody. The verdict was, therefore, entered for the defendant.

In support of the third count, it was proved that in the afternoon of the same 22d of April, the plaintiff went again into the workshop, and began to unscrew the turning-lathe, with the intention of removing it. The defendant thereupon gave him into custody, and had him taken before a magistrate, on a charge of doing wilful damage to a printing-press. The magistrate, thinking it was a case of disputed property, dismissed the charge. The jury found that the plaintiff had acted under a fair claim of right, but that the defendant *bonâ fide* believed that he was committing wilful damage to the defendant's property, and they assessed the damages contingently at 5*l*.

In support of the fourth count, it was proved that, on the 27th of April, at 6 A. M., the plaintiff went again to the workshop, broke open the door, and began to remove the machinery into his van. The defendant, thereupon, gave him into custody and had him taken before

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a magistrate, on the charge of stealing from a shop. The magistrate thinking it was a case of disputed property, dismissed the charge. The jury found that the plaintiff had not committed felony, but that the defendant *bonâ fide* believed that he had, and they assessed the damages contingently at 20*l*.

No notice of action had been given.

For the defendant it was contended that he had acted *bonâ fide* in pursuance of the law, and that the verdict ought to be entered for him on the third and fourth counts; that as to the third count, he was entitled to notice of action under the Malicious Trespass Act, the 7 & 8 Geo. 4, c. 30, s. 41; and as to the fourth count, that he was entitled to notice of action under the Larceny Act, the 7 & 8 Geo. 4, c. 29, s. 75. For the plaintiff, it was urged that the defendant could not be said to have *bonâ fide* believed that he was acting in pursuance of those statutes, it not having been shown that at the time when he gave the plaintiff into custody he knew that such statutes existed. The learned judge directed the verdict to be entered for the plaintiff on the third and fourth counts, and reserved leave to the defendant to move to enter it for him on each.

Byles, Serg. (May 4) moved for a rule *nisi* accordingly, and for a new trial on the ground of misdirection. There was no evidence to support the first count. In *Selwyn*, N. P. 29, an assault is defined to be an attempt with force or violence to do a corporal injury to another. There must be at the time an intention coupled with a present ability of using actual violence, and also, it is submitted, an attempt to use it. Therefore, if a man point a gun at another who is not within shot it is no assault, nor if a man point a pitchfork at another who is not within reach. In this case there was nothing more than a threat; the plaintiff was frightened and went out.

[*WILLIAMS*, J. The men mustered round him, and tucked up their aprons and sleeves, and threatened to break his neck. In the case put in *Buller*, N. P. 15, of a man laying his hand upon his sword and saying, "If it were not assize time I would not take such language," it is assumed that the action would amount to an assault if the words did not negative the intention.]

The man must be within striking distance — *Genner v. Sparks*, 1 Salk. 79. If he has to walk a step there is no present ability. There was no evidence in this case of any gesture to strike. Also the language used negated the intention, as in the case in *Buller*, N. P. The intention was to use violence only in an event which did not happen, namely, the plaintiff did not go out. As to the third count, the verdict ought to be entered for the defendant. The Malicious Trespass Act, the 7 & 8 Geo. 4, c. 30, s. 41, enacts, "That all actions and prosecutions to be commenced against any person for any thing done in pursuance of this act shall be laid and tried in the county where the fact was committed, and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action," in order that the person sued may tender amends. Here, no notice of action was given.

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To entitle defendant to notice, it was only necessary to show, and that the jury have found, that he *bonâ fide* believed that he acted in pursuance of the statute — *Booth v. Clive*, 10 Com. B. Rep. 857 ; s. c. 4 Eng. Rep. 374, and *Horn v. Thornborough*, 3 Exch. Rep. 846. It was suggested, at the trial, that he could not have reasonably believed that he was acting in pursuance of the statute, it not being shown that he knew of it, and without such reasonable belief there could be no *bonâ fides*. Section 28, enacts, “that any person found committing any offence against this act may be immediately apprehended without a warrant by any peace officer, or the owner of the property injured, or his servant, or any person authorized by him.” The defendant, no doubt, knew the law to be as it is there enacted ; everybody is presumed to know the law, but it was not necessary that he should be able to quote the act of parliament, chapter and section, or even to know whether he was acting in pursuance of the statute, or of the common law.

[JERVIS, C. J. The question was fully considered in *Hughes v. Buckland*, 15 Mee. & W. 346, which was an action for assaulting the plaintiff; and there it was contended that protection was only given to persons who fill the character mentioned in the act. But the court held, that the defendants, who were gamekeepers, and who acted under a *bonâ fide* belief that they were entitled to apprehend the plaintiff, were entitled to notice of action. The question arose there under the 7 & 8 Geo. 4, c. 29, but I hardly think the defendants knew much about that act.]

In the present case there was no evidence, it is true, that the defendant knew of the act, nor, on the other hand, was there evidence that he did not know of it; and the court cannot say, in the absence of evidence one way or the other, that he did not. The same questions arise on the fourth count under the Larceny Act, the 7 & 8 Geo. 4, c. 29. Section 15, enacts, “that if any person shall break and enter any shop and steal therein any chattel, &c., every such offender shall be liable to a certain punishment.” Section 63, authorizes a police officer or the owner of the property, or his servant, to apprehend any person found committing any offence punishable under the act without warrant; and section 75, requires notice of action when the defendant is sued for any thing done in pursuance of the act. As to the misdirection, the jury have found that the plaintiff and the defendant were joint owners of the goods, but there was no evidence to support that finding, and the judge ought to have so told the jury.

[WILLIAMS, J. It is not material whether the defendant was the real owner or not, supposing he *bonâ fide* believed that he was acting in pursuance of the statute which authorizes the owner to apprehend offenders. The finding of the jury that he *bonâ fide* believed that the plaintiff was committing a felony, involves the finding that he thought they were his goods, otherwise he could not have thought the plaintiff was committing a felony, for the question of ownership only arose as between the plaintiff and defendant.

Rule nisi.

Allen, Serg., and *Charnock* now showed cause. As to the first count, there was ample evidence of an assault.

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[MAULE, J. No doubt there was. If there be such a thing as an assault without battery, this was one.]

As to the third count, the finding of the jury that the defendant acted *bonâ fide* is not sufficient to entitle him to notice of action; he must also prove that he reasonably believed himself to be authorized so to act, otherwise fools and madmen would be protected.]

[JERVIS, C. J. That argument was much urged in *Booth v. Clive*, but the court held the defendant was entitled to notice of action notwithstanding.]

Cann v. Clipperton, 10 Ad. & E. 582, decides that where a statutory protection is given to persons having acted in pursuance of the statute, a party is not entitled to the protection merely because he believed *bonâ fide* that he was so acting. There must be reasonable ground for the belief. As put by Patteson, J., "It is not because a man chooses to think himself acting under a statute that he can, by such mere fancy of his own, protect himself in an action."

[JERVIS, C. J. The defendant does not say that he was justified, but that the plaintiff did not give him an opportunity of tendering amends for the error he had committed.]

MAULE, J. The protection given by the act is intended for those who are in the wrong. A person who acts perfectly right needs no protection.]

But a man may be so much in the wrong as not to fall within the class of protected persons. *Hopkins v. Crowe*, 4 Ibid. 774, shows that the absence of all reasonable ground for belief is a sufficient reason for holding that the defendant did not act under that belief.

[JERVIS, C. J. That may be an argument in favor of a new trial. The finding of the jury is not in question here.]

MAULE, J. If it had been shown to the jury that the defendant could not by any possibility have believed that he acted in pursuance of the statute, they very likely would not have found that he acted *bonâ fide*.]

Cook v. Leonard, 6 B. & C. 351, and *Morgan v. Palmer*, 2 Ibid. 729, also show that there must be limits to the protection given by the act. But further, section 28 of the Malicious Trespass Act only authorizes the apprehension of persons found committing offences. The evidence is, that on the morning of the 22d of April, the plaintiff began to pull down the printing press, the defendant not being there; in the afternoon of the same day he unscrewed the turning-lathe; the defendant was present then, and had him taken up, and the charge was for wilful damage to the printing-press. But the defendant had not found him damaging the printing-press.

[TALFOURD, J. In *Cann v. Clipperton*, the question arose on this same section, and the jury found that the defendant acted *bonâ fide*, but that the plaintiff was not at the time in question, found committing any offence against the statute; but the court held that the defendant, notwithstanding that finding, was entitled to notice of action.]

There the defendant had reason to think the mischief was going on when he ordered the plaintiff to be apprehended, but he could not have thought so here.

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[JERVIS, C. J. Suppose a man is found by a servant damaging his master's property, and instead of taking the man into custody, the servant goes for his master, who does not arrive till the man has left off doing damage, may not the master give him in charge?]

No. The servant might who found him committing the trespass.

[JERVIS, C. J. The cases are collected in 1 Russell on Crime, p. 472, under the Poaching Acts, and one not unlike this is cited to show that if a poacher be found on the manor by a servant of the lord, and run off it, but being pursued return upon it again, the servant may apprehend him, for it is the same as if he had never been off the manor.]

The defendant here never, at any time, found the plaintiff doing damage to the press. He acted on the information of others, which distinguishes the case from the one cited. As to the fourth count, the 7 & 8 Geo. 4, c. 29, s. 63, gives the authority to apprehend persons committing offences against the act. The only offence which it could be pretended that the plaintiff had committed was the offence defined in section 15, breaking and entering a shop. But the charge made was for stealing from a shop, not for breaking and entering.

[MAULE, J. We shall very much narrow the protection intended to be given by the act, if we allow special demurrers to the charge sheet.]

But, further, unless what the defendant supposed the plaintiff was doing was punishable under the 7 & 8 Geo. 4, c. 29, the defendant is not protected by that statute; section 3, which affixes the punishment, is repealed by the 12 Vict. c. 11, s. 1, so that breaking and entering a shop is no longer punishable under the 7 & 8 Geo. 4, c. 29.

[JERVIS, C. J. Section 3 of the 7 & 8 Geo. 4, c. 29, is only repealed so far as relates to the punishment of transportation.]

Lastly, there was no evidence that the defendant knew of these acts of parliament. The presumption that a man knows the law, only applies to prevent him pleading ignorance of it.

[JERVIS, C. J. A man living in this country knows this much, that if he sees another stealing or damaging his property, he may have him up before a magistrate. How much more must he know? Must he know the year of the reign in which the act passed, or the chapter, or the section?]

Byles, Sergt., and *J. Brown*, declined to argue in support of the rule to enter the verdict for the defendant on the first count, and the court did not call upon them to support the rule on the other counts.

JERVIS, C. J. I am of opinion that this rule should be discharged as to the first count; for if any thing positively short of a battery can amount to an assault, there was ample evidence of an assault here. The evidence is, that the defendant and his men mustered round the plaintiff, tucked up their sleeves and aprons, and threatened to break his neck if he did not go out, showing, within the legal definition of an assault, an intention and a present ability to inflict personal violence upon him. On the third and fourth counts, I think the rule

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must be absolute to enter the verdict for the defendant. We are not here considering whether the defendant was at liberty to give all special matters in evidence to establish a complete justification, but whether he has shown enough to entitle him to notice of action. Notice of action, as has been often said, is not required by those who are in the right and have a perfect justification under the act, but by those who are in the wrong, in order that they may have an opportunity of tendering amends. The plaintiff says, as to the third count, that section 28 of the 7 & 8 Geo. 4, c. 30, only authorizes the owner of property injured, or his servant, or any person authorized by him, to apprehend any person found committing an offence against the act, and that inasmuch as the plaintiff began to pull down the printing-press in the morning, and an interval elapsed before he came upon the premises in the afternoon, when he was given in charge for damaging the press, that he was not, within the meaning of that section, at the time he was given in charge, found committing an offence; and that the defendant was, therefore, not entitled to give him in charge. It is unnecessary to determine the meaning of the word "found," for the defendant does not want to establish a full and perfect justification, but only enough to entitle him to notice of action, that is, that he *bonâ fide* believed that he was acting in pursuance of the statute, that he was the owner of the property and acting in the exercise of a legal right. It is true the jury have found that the property belonged to the plaintiff and the defendant jointly, but they have also found that the defendant was asserting a right to which he thought he was entitled; they have found that he acted under a *bonâ fide* belief, and that is all that is necessary to entitle him to notice of action. This applies also to the fourth count, as to which a further point was made, viz., that the stat. 12 Vict. c. 11, s. 1, which repeals a portion, had repealed the whole of the 8 & 9 Geo. 4, c. 29, s. 3. But on reading the section, it is quite obvious that there is no foundation for that argument whatever. It has also been urged, that the defendant could not have believed that he acted in pursuance of the acts referred to, because it was not shown that he knew of them. That is a point which was never made before in any case, and which does not arise on the finding of the jury in this. For if, as they have found, the defendant *bonâ fide* believed he was acting in prosecution of a legal right, and that he was justified by the law, it was not necessary that he should know the acts, chapter and section. For these reasons, I think the rule must be discharged, as to the first count, and absolute to enter the verdict for the defendant, on the third and fourth.

MAULE, J. I think so too. As to the defendant not knowing the precise statutes referred to, there is no reason to suppose that he acted otherwise than quite *bonâ fide*; his whole conduct was that of a man meaning to attain a legal right, and to pursue a legal course, though not exactly pursuing the statute. If his conduct was illegal, the illegality was such that the legislature has said he shall have notice of action to enable him to tender amends. When it is said

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that a man does a thing in pursuance of an act of parliament, it is not necessarily meant that he does it in exact accordance with the provisions of the act. A man may be said to pursue the act when he endeavours, though unsuccessfully, to comply with its provisions. As to the question of *bona fides*, *Booth v. Clive* decides that the defendant is entitled to notice of action, if he *bonâ fide* believes he is acting in pursuance of the statute, although there may not be reasonable ground for this belief. Whether he had reasonable ground or not may be very fit to be considered, when the question is as to his *bona fides*, for a case may be supposed where there is such a want of reasonable ground for belief as to negative his *bona fides*; as, for instance, if a stranger to a particular transaction were to interfere and act in a way in which a police officer only is authorized to act, a jury might say, that as he was not a police officer, he could not have believed himself authorized so to act, and, accordingly, might negative *bona fides*. But in this case there was ample evidence to go to the jury, that the defendant's belief was founded upon reasonable grounds.

CRESSWELL, J., and TALFOURD, J., concurred.

Rule discharged, as to the first count.

Rule absolute to enter the verdict for the defendant, on the third and fourth counts.

READ and another v. FAIRBANKS and others.¹

June 8, 1853.

Contract, Construction of — Time of vesting Property — Bill of Sale — Habendum, Effect of — Trover — Damages — Ship Registry Act, 8 & 9 Vict. c. 89. s. 11.

On a contract for building a ship, it is a question of intention to be inferred from the circumstances whether the property passes before the completion of the ship or not.

The plaintiffs contracted with R. to build a ship for them, and made advances from time to time in respect of her; and R. gave them, as a security for the advances, a bill of sale of the ship, which stated that he, R., thereby did sell, transfer, &c., to the plaintiffs a certain ship in progress of building, (describing her,) to have and to hold the ship, &c., to the plaintiffs forever when she should be completed: —

Held, that the present property passed to the plaintiffs by the bill of sale, and that the vesting of it was not postponed by the *habendum* to the time when the vessel should be complete.

The defendants having converted the vessel before she was finished, and having finished her, the plaintiffs were

¹ 22 Law J. Rep. (N. S.) C. P. 206; 1 Com. Law Rep. 787; 17 Jur. 918.

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Held entitled to recover, as damages in trover, the value of the vessel at the time of her conversion, but not her value at a subsequent time, nor, as special damage, the value of freight which the plaintiffs might have earned with her, if R. had completed her, and delivered her to them; and, per Jervis, C. J.,

Seem, that a proper way to estimate the value of the vessel at the time of the conversion would be to ascertain her value at the place where she was built, when completed according to the original contract, and to deduct therefrom the amount which it would have been necessary to lay out after the conversion, in order to complete her according to the contract.

Quære, as to the effect of a certificate under the Registry Act, 8 & 9 Vict. c. 89, s. 11, on the property in a vessel built in British possessions abroad.

TROVER for a ship, boats, stores, &c., alleging as special damage the loss of freight for a certain voyage.

Pleas — not guilty, and a traverse of the plaintiffs' property in the ship.

The cause came on for trial, at the London Sittings after Michaelmas term, 1852, when, by consent, a verdict was found for the plaintiffs, subject to a special case.

The case stated the following among other facts: — The plaintiffs were merchants at Glasgow, the defendants merchants at Halifax, Nova Scotia, and A. Russell was a ship-builder at Pictou, in Nova Scotia. Russell, since 1845, had been in correspondence with the plaintiffs, and had built ships and consigned them to the plaintiffs, as his agents, for sale; and at the end of 1847, Russell was indebted to the plaintiffs on a balance of accounts. A correspondence having taken place between them as to the building of a ship of a specific kind, Russell, in February, 1848, informed the plaintiffs that he intended commencing the ship in April, but wanted advances from them. To this the plaintiffs answered by making an advance, although Russell had not paid their balance. Afterwards, Russell drew again on the plaintiffs, announcing that he had commenced the vessel; and on the 22d of June, 1848, he wrote to them a letter, stating that he had drawn on them once more, and which contained the following passage: — "I inclose you a bill of sale of the ship now building for you, according to your draft, and expect to have her finished in good time to send home to you this season." The inclosed bill of sale, dated the 20th of June, 1848, recited that the plaintiffs had made advances to Russell, and agreed to make such further advances as he might require to build and equip a certain ship, &c., and proceeded thus: — "and for the security and repayment of all such sum or sums of money as they, the said J. Read, &c. have already advanced, or may hereafter advance to assist me to complete and finish the said vessel, I, the said A. Russell, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over unto the said J. Read, &c., a certain ship or vessel now in course of progress of building by me, the said A. Russell, on, &c., (describing the vessel,) and all masts, boats, &c., and also 600 tons of timber, to finish the vessel; to have and to hold the said ship or vessel, with the appurtenances, together with the said boats, timber, and other goods to the said J. Read, &c., their executors, &c., to their absolute use and benefit and behoof for-

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ever, when the said ship or vessel shall be complete and finished, in as full, ample and perfect a manner as if the said ship or vessel was ready for sea, and ready to be delivered to the said J. Read, &c., at the time of executing these presents." Russell then proceeded to agree that as soon as the ship was sufficiently advanced to be measured, he would cause her to be registered, and an indorsement to be made on the certificate of registry as by law required, in the name and for the benefit of the plaintiffs.

In October, 1848, Russell signed an agreement to finish the ship on certain terms. On the 30th of January, 1849, Russell gave to the Comptroller of Customs at Pictou a certificate that the ship, which was called the *Lavinia*, was built at Pictou for the plaintiffs, and made a declaration in that certificate, and a declaration of ownership, in which he described himself as agent for the plaintiffs, and as master of the ship, and stated that the plaintiffs were the sole owners of the ship. Thereupon, the comptroller granted a certificate, pursuant to the provisions of the 8 & 9 Vict. c. 89, s. 11. In the month of February, Russell wrote letters to the plaintiffs relative to the ship, and drew fresh bills upon them. The plaintiffs accepted the bills, but wrote to restrict his future drafts within a certain sum. Russell appeared after that to have entered into treaty with the defendants for advances to finish the ship. On the 29th of March, Russell presented the declaration and certificates to the comptroller, procured them to be cancelled, made a fresh declaration describing the ship as built for himself and his own property, and obtained a certificate of registration, wherein he himself was described as the true and sole owner of the ship. On the same day Russell executed a bill of sale of the ship to the defendants, which was recorded at the custom-house, and indorsed on the certificate. At this time the hull of the vessel was nearly complete, and the materials for the rigging had been provided. The ship was completed, and launched on the 17th of July, 1849, and before the 7th of August was loaded by the defendants with a full cargo, the property of the defendants, and sailed on that day. On the 1st of October Russell conveyed the ship by deed to the defendants, who on that day obtained a certificate of registration as owners. The ship made her voyage and delivered her cargo at Liverpool, and the plaintiffs demanded possession of her before this action was brought.

The questions for the court were, first, whether the plaintiffs were entitled to recover in this action; and, secondly, on what principle the damages ought to be assessed, leaving it to an arbitrator to apply that principle.

Fitzroy Kelly, (Barstow was with him,) for the plaintiffs. The plaintiffs are entitled to maintain this action, for the property in the ship passed to them absolutely by the bill of sale of the 20th of June; and nothing which was afterwards done under the Registry Act affected that transfer. From the correspondence, it is quite clear, that it was the intention of the parties that the property should pass. The ship was built by Russell for the plaintiffs, and they made

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advances to him in order to enable him to complete it for them, and it is clear from Russell's letters that he treated the ship as theirs, and meant by his letter of the 22d of June, which inclosed the bill of sale, that the plaintiffs should have the ship itself as security for their advances. The case of *Woods v. Russell*, 5 B. & Ald. 942, has an important bearing upon the present one. That was an action of trover by the assignees of a bankrupt who had built a ship, against the defendant who had ordered the bankrupt to build it, and had agreed to pay the price in four instalments, three of them during the progress of the building, and the fourth on its completion, and had paid three of the instalments. There, it was held that the property in the ship passed to the defendant before its completion, and Abbott, C. J. used these words in giving judgment: "The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship, and that as between him and the builder he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other." The plaintiff, therefore, is entitled to the property in the ship, irrespective of the Register Act. But the effect of what was done under that act is rather to support than to weaken his title. The act is the 8 & 9 Vict. c. 89, "for the registering of British vessels;" the 2d section of which provides, that no vessel shall enjoy the privileges of a British ship till she is registered under the act. In the 11th section, which defines to what port a vessel shall be deemed to belong, there is a proviso that ships built in our foreign possessions for owners resident in the United Kingdom may have a certificate from the collector of the port at or near which the ship was built, which will enable her to trade as a British vessel for two years, or until her arrival in the United Kingdom. Now, the first certificate granted in this case by the Comptroller of Pictou shows that the property was in the plaintiffs, and his subsequent wrongful act in cancelling that document and granting another can have no effect to divest the property out of the plaintiffs. Lastly, as to the question of damages, the plaintiffs are entitled not only to the full value of the ship, but also to the freight which she would have earned as special damage for the want of the use of the ship. The plaintiffs say, that if the defendants had not converted the ship, they themselves would not only have had the ship itself but would have earned freight.

[JERVIS, C. J. In the ordinary case of trover for a horse, the plaintiff recovers the value of the horse, and not what the horse might have earned besides.

MAULE, J. My Brother Parke has said that a plaintiff may recover special damage in trover. That was where money had been necessarily laid out in consequence of a conversion.

On what principle can it be urged that a person cannot recover damages for the result of a wrong done to him?

MAULE, J. I rather think that the value of the thing at the time of the conversion is all that can be recovered.

CRESSWELL, J. Consequential damage may arise where a party

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whose property has been converted was under a contract to sell that property. But that is not shown to exist in this case, and the plaintiffs might as well claim the earnings of the ship for six or seven years as the freight for one voyage.

MAULE, J. I remember a case of trover for a cow, where the value not only of the cow, but also of her milk, was claimed. This must be included in the value of the ship itself. People would not pay for a ship that could not earn freight.]

Bramwell, contra. The first question is whether the plaintiffs have any property in the ship. And in the first place, without insisting on the Registry Act, it must be admitted by the plaintiffs, on the one hand, that something more is necessary on a contract for making a chattel to pass the property in the chattel than the contract and the making of the chattel; while on the other hand, it is not denied that the property in a future chattel may be conveyed. But the whole circumstances of the case must be looked at, and then it is to be seen whether it was the intention of the parties that the property should vest before the completion of the ship. In *Laidler v. Burlinson*, 2 Mee. & W. 602, there was a contract for a ship in the course of construction, and Parke, B. said it was *obligatio certi corporis*, which, though it gave a right of action against the builder for not finishing the particular ship, yet did not pass the property till the completion of the ship.

[MAULE, J. That shows that there may be a contract in respect of a chattel before it is completed, by which the property will not pass. In *Mucklow v. Mangles*, 1 Taunt. 318; where a party contracted for a barge not yet *in esse*, and paid the whole price, by instalments, during the progress of the building of the barge, and his own name had always been painted on it, it was held that the contract was not a contract of sale, but a contract to finish the barge, and that the property did not pass.]

In *Acraman v. Morrice*, 8 Com. B. Rep. 449; where a person contracted for the purchase of certain portions of felled trees, which he selected and marked, and it was the duty of the vendor to sever the timber and convey the marked portions to the vendee's wharf, it was held that the property did not pass by the contract and the marking out. In *Clarke v. Spence*, 4 Ad. & E. 448; though it is not in the defendant's favor, having decided that in the payment of instalments the finished portions of a ship passed to the purchaser, still it appears that the Court cast some doubt on part of the reasoning on which *Woods v. Russell* was decided. In this case, although there were in the bill of sale words of present sale, they did not, in fact, pass the present property in the ship as it stood any more effectually than they passed the property in things which did not then exist. The bill of sale states in the *habendum* that the plaintiffs are to have and hold the ship, &c., when she shall be complete and finished, and the effect of the *habendum* in a deed is to restrain the generality of the premises. Com. Dig. tit. "Fait," E. 9. The popular construction of his document, which will indicate the intention of the parties,

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would be that Russell was to build a ship for the plaintiffs, and they were to have it when it was complete, and in the mean time they were to have some kind of security for their advances; but the bill of sale itself does not secure the present property to the plaintiffs. In the next place, the provisions of the Registry Act show that the defendants are the owners of the vessel. But supposing that the property did pass to the plaintiffs, and that the action is maintainable, the proper measure of damage is what the ship would have sold for at the time of the conversion, and no special damage such as that claimed can be recovered. The plaintiffs might as well claim the value of the ship, and all she might ever have earned, and the value of her timbers when she should at last be broken up.

[JERVIS, C. J. The court takes that view of the case, that the plaintiffs can recover only the value of the ship at the time she was taken.]

Kelly, in reply. As to the damages, it seems clear that the plaintiffs are entitled to recover the value of the ship at the time of the conversion, and of all which was afterwards added to her. What was done after that time by the defendants was done of their own wrong, and the plaintiffs were entitled to the benefit of it. The plaintiffs were entitled to take the very ship, and may recover its value at any time after the vesting of the property in them. If the frame of a ship or carriage belong to me and some one in my absence, of his own wrong, spend 1,000*l.* on it, I am surely entitled to take it as I find it. In *Greening v. Wilkinson*, 1 Car. & P. 625, Abbott, C. J., held that in trover the jury may find as damages not only the value of the chattel at the time of the conversion, but its subsequent value, at their discretion.

[MAULE, J. Although it be true that in trover the owner may recover for the conversion of the improved chattel, it does not follow that he is entitled to recover the improved value as damages. The proper amount of damages is the amount of pecuniary loss which the plaintiffs have been put to by the defendant's conduct.

JERVIS, C. J. You cannot make the defendant pay for the non-completion of the contract by Russell.]

In *Martin v. Porter*, 5 Mee. & W. 351, which was trespass for breaking into a mine and taking coals, the plaintiff was held entitled to the value of the coal when gotten, without deducting the cost of getting it.

[JERVIS, C. J. The damages should be the value of the vessel and all stores, &c., at the time of the conversion, that is, on the 29th of March; and a proper mode of ascertaining that would be to ascertain the value of the ship at Pictou when completed according to Russell's contract with the plaintiffs, and deduct from that the amount which it would be necessary to lay out after the 29th of March, in order to complete her according to the contract.]

It was then agreed by the counsel, that the damages to be ascertained by the arbitrator were to be the value of the ship and all stores on the 29th of March.

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JERVIS, C. J. The parties having agreed upon the principle upon which the damages are to be assessed, I am of opinion that the plaintiffs are entitled to the judgment of the court. In truth, the matter turns entirely upon the construction of the bill of sale of the 20th of June 1848. There is no doubt the whole question is one of construction of contract. There may be cases in which such a contract would have the effect of transferring the property only at a future period, or it may have the effect of transferring the property at once; but it seems to me that here it was intended to pass the property at once, because the object of the instrument was to give the plaintiffs security for advances. It has been contended that it is no security, but merely a contract between the parties; but it professes to be a security, and it cannot be so unless it operate as a present sale; and it does not signify what happens afterwards. It is, therefore, unimportant to consider the effect of the registration of the vessel. I think it very likely that if there had been no bill of sale, there would still have been enough to bind the property in the ship. But it is unnecessary to consider that part of the case. If the property was the property of the plaintiffs, it is conceded that the 29th of March was the day of the conversion; and the value of the ship at that time will be the damages to be recovered.

MAULE, J. I am of the same opinion. Construing this contract with reference to the existing *status* of the parties, it is quite clear that the bill of sale was intended to be given as a security by Russell, the ship-builder, to the plaintiffs, for their advances. Unless some property passed in something by the instrument, there would have been no security. It is clear it was intended that the property should pass. Indeed, the parties, so far from not intending that any property should pass, seem to have intended to pass, not only what was capable of passing, but a great deal more. That sort of attempt is often made. People purport to convey by bill of sale, not only all the property which may happen to be on certain premises, but what may be brought upon them subsequently. But, surely, because parties make an effort to do more than they can, it cannot be said that they do not intend to pass what will pass. Here the ship, actually on the stocks, is described in plain words as the principal subject of the conveyance. That property was capable of passing, and the words used to pass it are sufficient. The subsequent words, "to have and to hold," apply no doubt to the ship when finished; but that is not inconsistent with the present passing of that which was finished. There is nothing to take away this operation from the instrument, or to defeat the manifest intention of the parties.

CRESSWELL, J., and TALFOURD, J., concurred.

Judgment for the plaintiffs.

Udney v. The East India Co. Evans v. Edmonds.

UDNEY v. THE EAST INDIA COMPANY.¹

May 29, 1853.

*Practice — Special Case — Signature of Counsel dispensed with —
Common Law Procedure Act.*

The court directed a special case to be set down for argument, which was signed by the plaintiff, (who intended to argue it in person,) and by counsel for the defendants.

THIS was a special case after issue joined, signed by counsel for the defendants, and by the plaintiff who intended to argue it himself. The master having declined to set it down for argument unless signed by counsel for the plaintiff, the latter now applied in person to the court to direct the master to set it down without counsel's signature.

JERVIS, C. J. The rule as laid down in Chitty's Archbold, 442, is, "that it is not absolutely necessary that the case should be signed by counsel, but that any thing which shows consent to a case as stated is sufficient," and *Price v. Quarrell*, 12 Ad. & E. 784, is cited. The Common Law Procedure Act, section 85, says that counsel's signature shall not be required to any pleading. I think it may be dispensed with here. The case is signed by the plaintiff.

Direction accordingly.

EVANS v. EDMONDS.²

June 1, 1853.

Husband and Wife — Deed of Separation — Fraudulent Misrepresentation — Pleading.

By deed of three parts between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay to the trustees an annuity for the separate maintenance of the wife. The trustee having sued the husband for arrears of the annuity, the latter pleaded that he was induced to make the deed by means of false and fraudulent representations made by the plaintiff to him, that is to say, by the plaintiff, before the making of the deed, falsely and fraudulently representing to him that E, the wife, was a virtuous person, whereas in truth the said E was not a virtuous person, and the plaintiff "had then carnally known the said E. so then being the wife of the defendant, and subsequently to the intermarriage of the said E. and the defendant, and before the making of the deed," which last-mentioned facts the plaintiff concealed from the defendant, and induced him to make the deed, in order that the plain-

¹ 23 Law J. Rep. (N. S.) C. P. 211.

² 22 Law J. Rep. (N. S.) C. P. 211; 17 Jur. 888; 1 Common Law Reports, 653.

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tiff might continue an adulterous intercourse with the said E. At the trial, the plea was proved, and the verdict thereon entered for the defendant:—

Held, on motion to enter judgment for the plaintiff *non obstante veredicto*, that although the plea did not show that the representations set out were necessarily fraudulent, it not being alleged that the plaintiff knew them to be false, or that he knew that E. was the defendant's wife at the time he had intercourse with her, yet it might be sustained as a general plea of fraud, which, after verdict, was a good answer to the action.

Held, also, that it was not necessary to allege that the wife, as *cestui que trust*, was a party to the fraud upon the defendant, as a court of law can only look to the legal rights of the parties to the deed.

Semble, per Maule, J., that if the plaintiff, intending to deceive the defendant for the plaintiff's own advantage and the defendant's disadvantage, induced the latter to make the deed by representing a fact to be true which was not true, but about which the plaintiff knew nothing, that would amount to fraud, and avoid the deed.

THE declaration stated that by indenture of the 11th of January, 1844, between the defendant of the first part, Emily Elizabeth, wife of the defendant, of the second part, and the plaintiff of the third part, the defendant did for himself, his heirs, executors, and administrators, covenant with the plaintiff, his executors and administrators, that he, the defendant, would, during the joint lives of the defendant and his wife, pay to the plaintiff, his executors, administrators, or assigns, the clear yearly sum of 59*l.* 19*s.* 6*d.*, by four equal quarterly portions, on the 4th of February, the 4th of May, the 4th of August, and the 4th of November in every year. Breach, that the defendant did not pay, and that there is now due 29*l.* 19*s.* 9*d.* in respect of two quarterly payments respectively due to the plaintiff heretofore, and during the life of the said Emily Elizabeth, to wit, on the 4th of February and the 4th of May, 1852.

The defendant craved oyer, and after setting out the deed (from which it appeared that differences had existed between the defendant and his wife, and that they had agreed to live separate, and that the annuity was to be paid to the plaintiff, as trustee for the wife, for her future maintenance,) pleaded, *non est factum*. Secondly, that he was induced to enter into and to make the said indenture, and to covenant, as in the declaration alleged, through and by means of certain false and fraudulent misrepresentations of the plaintiff, by him made to the defendant in that behalf, that is to say, by the plaintiff, before and at the time of the making of the said indenture by the defendant, falsely and fraudulently representing to the defendant, that the said Emily E. Edmonds, the wife of the defendant, was a person of virtuous, moral, and modest conduct and behavior, and that the plaintiff, who then was, and still is, a married man, and the father of divers, to wit, six children, lawfully begotten, was a person of virtuous, moral, and modest conduct and behavior, and a fit and proper person to act as a trustee for and on behalf of the said Emily E. Edmonds, for the purposes in the said indenture mentioned and contained, and for the defendant to covenant with as in that behalf in the declaration and the said indenture respectively mentioned, whereas in truth and in fact the said Emily E. Edmonds was *not then* a person of virtuous, moral, or modest conduct or behavior, nor was the plaintiff then a person of virtuous, moral, or modest conduct or

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behavior, or a fit or proper person to act as such trustee for or on behalf of the said Emily E. Edmonds, for the purposes in the said indenture mentioned and contained, or for the defendant to covenant with, as in that behalf in the declaration and in the said indenture mentioned; and the plaintiff had then treacherously and perfidiously seduced, corrupted, and carnally known the said Emily E. Edmonds, so then being the wife of the defendant, and subsequently to the intermarriage of the said Emily E. Edmonds and the defendant, and whilst the plaintiff was a married man and the father of the said children as aforesaid, and before the making of the said indenture, which last-mentioned facts the plaintiff before and at the time of the making of the said indenture suppressed and concealed from the defendant, and the plaintiff then so fraudulently and covinously induced and procured the defendant to make the said indenture, in order that he the plaintiff might seduce away the said Emily E. Edmonds from the defendant, and might harbor and have access to her for the purpose of having, continuing, and keeping up an adulterous and criminal intercourse and conversation with the said Emily E. Edmonds, so being the wife of the defendant as aforesaid; and the defendant says that he was induced to enter into and to make the said indenture in the declaration mentioned, and to covenant as therein alleged, through and by means of the said false and fraudulent misrepresentations of the plaintiff, and by reason of the suppression and concealment as aforesaid of the premises so suppressed and concealed as in this plea mentioned, and in ignorance thereof, and not otherwise. Verification. Thirdly, that the plaintiff caused and procured the defendant to make the said indenture and to covenant as in the declaration mentioned, and the defendant was induced to enter into and make the said indenture through and by means of the fraud and covin of the plaintiff. Verification.

The plaintiff replied, joining issue on the three pleas.

The cause was tried, before Jervis, C.J., at the sittings for Middlesex after last Michaelmas term, when the verdict was entered for the plaintiff on the first and third issues; and, the jury having found all the allegations in the second plea proved, the verdict was entered for the defendant on that, and leave was reserved to the plaintiff to move for judgment thereon *non obstante veredicto*, and to the defendant to move to enter the verdict for him on the third plea.

E. James, for the plaintiff, obtained a rule *nisi* accordingly, or for a new trial; and the court gave

Montagu Chambers, for the defendant, leave to raise the point reserved, as to entering the verdict for the defendant on the third plea, on showing cause against the plaintiff's rule.

Montagu Chambers and *Atherton* now showed cause. The second plea was proved at the trial, and the question is, whether it is a good defence. It is good as a plea of fraud. It alleges that the plaintiff had, before the execution of the deed, debauched the defendant's wife;

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that he suppressed that fact from the defendant, and induced the defendant thereby, and also by positive misrepresentation, to enter into the deed, and that he did it with a view to the continuance of his own adulterous intercourse. There is no legal or moral liability on a man to support his wife after adultery; and it is clear that the defendant would not have made the deed and undertaken a liability from which his wife's conduct had relieved him, or from which, after his wife's conduct, he might have relieved himself, had he known what the plaintiff concealed. There was, therefore, a misrepresentation and a concealment of material facts constituting fraud. *Chitty on Contracts*, 4th ed. 589.

[JERVIS, C. J. It is not alleged that the plaintiff knew at the time that he seduced Emily E. Edmonds, that she was the defendant's wife.]

It is alleged that she was so in fact, and it will be assumed from the plea that the plaintiff knew it.

[MAULE, J. The plea contains a great deal of vituperation, which might have been well omitted, and the omission supplied by the very simple and usual allegation "of all which premises the plaintiff had notice."

CRESSWELL, J. The plea avers that the defendant was induced to covenant by means of false and fraudulent misrepresentations, "that is to say, &c." But it does not show of necessity that the representations which follow were fraudulent, because it is not said that the plaintiff knew them to be false. The question is, can we reject what follows after the words "that is to say?" If we can, then the plea amounts to a general plea of fraud.]

If the plaintiff, for a fraudulent purpose, states what is untrue, though he does not know it to be untrue, but does not believe it to be true, that is fraud. *Taylor v. Ashton*, 11 Mee. & W. 401. The plaintiff's object is stated to have been to seduce away the defendant's wife in order that he might have the opportunities of continuing an adulterous intercourse with her. It is not consistent with that allegation that he could have believed that his representation that she was a virtuous person was true, he must have known it to be untrue. Secondly, the plea is a good defence, on the ground that a man cannot take advantage of his own immorality. On moving for the rule, it was contended that the plea was no answer, without an allegation that the wife was a party to the fraud, the deed being for her benefit, and she being the real plaintiff, the nominal plaintiff being only a trustee. But a court of law cannot look beyond the legal rights of the parties. If this had been a simple covenant to pay a sum of money to the plaintiff, this court could not have followed its application to the *cestui que trust*. Where a broker, in whose name a policy of insurance under seal was effected, brought covenant, and the defendants pleaded payment to the plaintiff according to the tenor and effect of the policy, and the proof was, that after the loss happened the assurers paid the amount to the broker by allowing him credit for premiums due from him to them, it was held, that although that was no payment as between the assured and assurers, it was a good pay-

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ment as between the plaintiff on the record and the defendants, and, therefore, an answer to the action. *Gibson v. Winter*, 5 B. & Ad. 96. The defendant is also entitled to have the verdict entered for him on the third plea; as a general plea of fraud is an answer to this declaration, and it was proved.

E. James and *Hawkins* were not present to support the rule.

JERVIS, C. J. I am of opinion that this rule, which seeks to enter judgment for the plaintiff on the second plea, *non obstante veredicto*, or for a new trial, should be discharged. Without entering into some of the questions which have been discussed, I think the second plea may be supported as amounting substantially to a plea of fraud. It alleges that the plaintiff fraudulently misrepresented to the defendant that the defendant's wife was a chaste and virtuous person, whereas she was not so, and by means of this false and fraudulent misrepresentation induced the defendant to enter into the deed. If the defendant had known of his wife's infidelity, it cannot be supposed that he would have entered into this deed, and undertaken a liability to maintain her, from which he might have relieved himself. He was induced, therefore, as the jury have found, to enter into the deed by a fraudulent misrepresentation of a material fact, and that is sufficient to avoid the deed, and to defeat this action. But I also think that the defendant is entitled to enter the verdict for him upon the issue raised by the third plea, and that apart from technical questions, that plea, after verdict, is a good answer to the action; because, if there had been a criminal intercourse between the plaintiff and the defendant's wife, before her separation from her husband, and the plaintiff, at the time of such intercourse, knew that she was the defendant's wife, and that he did know it was proved at the trial, and the plaintiff concealed that fact from the defendant with a fraudulent intention to induce him to enter into the deed, that was such a suppression of a material fact with an intent to deceive as will support the plea, and avoid the deed; and after verdict, we have a right to assume any state of facts to have been proved amounting to fraud which would support the plea, and abundant fraud was proved. As to the objection urged, when the rule was moved for, that the plaintiff on the record is a trustee only, and that the wife is the real plaintiff, and that no participation by her in the fraud is alleged, I think *Gibson v. Winter* is a sufficient answer. A court of law can only look to the legal interests of the parties, and not to their rights in equity. The covenant sued upon was made with the plaintiff, and fraud in him is alleged, and that is sufficient.

MAULE, J. I agree with the Lord Chief Justice that the second plea may be sustained after verdict, and that it is a good defence. It begins by alleging "that the defendant was induced to make the deed by means of certain false and fraudulent misrepresentations of the plaintiff, by him made to the defendant in that behalf, that is to say," and it then goes on to say what those misrepresentations were.

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[His lordship read the plea.]

Now, there is no statement there that the plaintiff knew the defendant's wife to be unchaste, or that he seduced her knowing her to be the defendant's wife. But in order to sustain the plea, there must have been evidence before the jury that the defendant was induced to make the deed by some false and fraudulent misrepresentations of the plaintiff; for if there were none, the Lord Chief Justice ought to have directed the verdict to be entered for the plaintiff. I do not say that to make the plea good, on special demurrer, it would be necessary to allege that the plaintiff knew the defendant's wife to be unchaste. It would be necessary to allege more than is alleged here; but whether in order to set up such fraud as would avoid the deed, it is necessary that the plea should contain an allegation that the plaintiff knew the defendant's wife to be unchaste, may be questionable. For if a person, not knowing a fact to be true, represents, with an intention to deceive, that he does know it to be true, and it is not true, that may be fraud, and that kind of fraud may have been proved in this case. It may have been proved that the plaintiff represented that he knew a fact to be true which was not true, when in reality he knew nothing about it. That misrepresentation, if made with intention to deceive, and to get something from the defendant, would amount to fraud, and be sufficient to avoid the deed. The court must after verdict assume that enough was proved to taint the deed with *crimen falsi*; and we say that the plea cannot now be understood in any sense consistent with the plaintiff's right to maintain this action.

On the third plea, also, the defendant is entitled to have judgment. It is a general plea of fraud, on which the plaintiff has joined issue, and not demurred, and at the trial it was proved.

CRESSWELL, J. I am of the same opinion. I intimated in the course of the argument how, after striking out certain allegations in the second plea, enough might remain to constitute a good defence after verdict.

TALFOURD, J., concurred.

Rule, for judgment non obstante veredicto on the second plea, discharged.

Rule, to enter the verdict for the defendant on the third plea, absolute.

 Reid v. Ashby.

 REID v. ASHBY and another.¹

June 9, 1853.

Costs — Arbitration — Recovery by Verdict of less than 40s.

The first count charged the defendants with damaging a party-wall by excavating it, and overloading it. Plea, as to the overloading, not guilty; and as to the excavating, payment of 30*l.* into court. Replication, damages ultra. At the trial, the verdict was entered for the plaintiff, damages 2,000*l.*, costs 40*s.*, subject to the award of an arbitrator, to whom the cause was referred on the usual terms, but without power to certify for costs under the 3 & 4 Vict. c. 24, s. 2, and he directed the verdict to be entered for the plaintiff on the first issue, with 20*s.* damages, and for the defendant on the second:—

Held, that the plaintiff had recovered by verdict less than 40*s.* damages, and that, therefore, the 3 & 4 Vict. c. 24, s. 2, applied, and deprived him of costs.

THE first count of the declaration charged the defendants with wrongfully excavating a party wall, and with raising and overloading it by building upon it.

The defendants pleaded, first, as to the raising and overloading, not guilty by statute, and, secondly, as to the residue, payment of 30*l.* into court.

The plaintiff joined issue on the first plea of not guilty, and replied damages ultra to the second.

The cause came on for trial, before Jervis, C. J., at the sittings for London after Trinity term, 1852, when a verdict was entered for the plaintiff, damages 2,000*l.*, costs 40*s.*, subject to the award of an arbitrator to whom the cause and all matters in difference between the parties were referred, with power to direct the verdict to be entered for the plaintiff or defendants, and to amend the record, and to certify that the cause was proper to be tried before a judge of the superior court, and, if necessary, for a special jury, but no power was given to certify, under 3 & 4 Vict. c. 24; the costs of the suit were to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator.

By his award, dated the 12th of January, 1853, the arbitrator directed the verdict to be entered for the plaintiff on the first issue, damages 1*l.*, and for the defendant on the second. The *postea* was drawn up assessing damages to the plaintiff on the first issue, 1*l.* and 40*s.* costs, and upon application by the defendants, an order was made by Maule, J., to amend the *postea* by striking out the award of costs. On taxation, the master refused to allow the plaintiff any costs on the first issue.

Honyman having obtained a rule, calling on the defendants to show cause why the master should not be at liberty to review his taxation, and why, if necessary, the order of Maule, J., should not be rescinded,

¹ 22 Law J. Rep. (N. S.) C. P. 215; 1 Common Law Reports 451; 17 Am. L. J. 20.

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and the award be set aside or referred back to the arbitrator, on the ground that he had not awarded any thing to the plaintiff for his costs on the first issue.

Hugh Hill and *Thrupp* showed cause. The question turns on the 3 & 4 Vict. c. 24, s. 2, which enacts, "that if the plaintiff in any action of trespass on the case shall recover by verdict of a jury less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever, unless the judge shall certify," &c. The object of the statute was the same as that of the statute of Elizabeth and Car. 2, to prevent frivolous and vexatious suits, and the verdict is the criterion. The finding of the arbitrator is substituted for the verdict of the jury, and he has given less than 40s. damages, and he had no power to certify. The costs are to abide the event, i. e. the legal event. *Swinglehurst v. Altham*, 3 Term Rep. 138; and *Ward v. Mallinder*, 5 East, 489. If there had been no payment of money into court here, this case would have been on all fours with those, and *Sharp v. Eveleigh*, 20 Law J. Rep. (n. s.) Exch. 282, s. c. 5 Eng. Rep. 467, shows that payment into court is not recovery by verdict, for if it was, no certificate would have been necessary in that case. The mischief intended to be remedied by the act is the same whether the plaintiff originally commences a frivolous suit, or continues a suit after an adequate sum has been paid into court; in the latter case the continuance of the suit is frivolous, if he afterwards recovers less than 40s. damages. They also cited *Taylor v. Rolf*, 5 Q. B. Rep. 337; *Poole v. Grant-ham*, 7 Man. & G. 1030; and *Richards v. Bluck*, 6 Com. B. Rep. 443.

Bramwell and *Honyman*, in support of the rule. Suppose a defendant damages the plaintiff's property to the extent of 31*l.* 19*s.*, and pays into court 30*l.*, why is the plaintiff to give up 1*l.* 19*s.* or lose his costs if he does not?

[TALFOURD, J. The same question might be asked if the damage was only 1*l.* 19*s.* originally. If the plaintiff sues for it, he does it at the peril of his costs. In the latter case the suit is frivolous at first, in the former it becomes frivolous when the defendant has paid into court 30*l.*]

It is submitted that a suit to be frivolous within the meaning of the preamble, must be so when it is commenced. The observations of Maule, J., and Williams, J., in *Richards v. Bluck*, are applicable. The act says, "if the plaintiff shall recover by verdict of a jury less damages than 40s.," &c. That means "if he shall recover less than 40s., and that by verdict;" so that he must not only recover less than 40s., but what he does recover must be by verdict. Here, the plaintiff has recovered more than 40s., for he has recovered 1*l.* plus 30*l.* paid into court. *Richards v. Bluck*, and *Harrison v. Watt*, 16 Mee. & W. 316. If it means he must recover 40s. by verdict, then he has recovered nothing by verdict, for the award of the arbitrator of 20*s.* is not a verdict of a jury, and so the statute does not apply. *Rolfe v. Taylor*

Towne v. D'Heinrich.

[WILLIAMS, J. Surely the award of the arbitrator is substituted for the finding of the jury.]

Cur. adv. vult.

The judgment of the court¹ was now delivered by

JERVIS, C. J. We have consulted the judges upon this question, and are of opinion that the rule ought to be discharged.

[His lordship stated the facts in substance as given above.]

We granted a rule to review the decision of the master, and in the argument on showing cause, it was admitted that the finding of the arbitrator was the same as a verdict, and the question turned upon the meaning of the 3 & 4 Vict. c. 24, s. 2. It is admitted that the plaintiff has here recovered less than 40s. by the verdict of a jury, or by the award of an arbitrator, which was substituted for it; and although he has taken out of court 30% on the second branch of his complaint, that was not a recovery by verdict. It was contended, that the meaning of the act was, "if the plaintiff shall recover less than 40s., and that by verdict of a jury;" and that if this were not so, there would be great hardship on the plaintiffs, for that by the defendant's payment into court a plaintiff might always be deprived in an action on the case of 39s. out of the amount of damages to which he was really entitled. Undoubtedly, that will be the effect of our decision. But the words of the act are clear: "If the plaintiff shall recover by verdict less than 40s." Here he has recovered by verdict less than 40s., and according to the plain meaning of the statute, he is entitled to no costs unless he recovers 40s. by verdict. This rule must, therefore, be discharged.

Rule discharged.

TOWNE v. D'HEINRICH.²

May 23, 1853.

Landlord and Tenant — Use and Occupation — Evidence — Entry.

In an action for use and occupation of a house, the under-sheriff directs the jury that actual occupation by the defendant was not necessary to support the action, but that a constructive occupation would do, but did not tell them what a constructive occupation was: —

Held, a misdirection.

THIS was an action for use and occupation of a house. It was tried before the under-sheriff of Middlesex, and it appeared that the

¹ JERVIS, C. J., CRESSWELL, J., WILLIAMS, J., and TALFOURD, J.

² 21 Law Times Rep. 128; 1 Common Law Reports, 335; 17 Jur. 1102; 22 Law J. Rep. (N. S.) C. P. 219.

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defendant, on a day before the 29th September entered into an agreement with the plaintiff to take a house for three years from the 29th September, and some repairs were to be done by the landlord. These repairs were done; but the defendant did not take possession (according to the affidavit on which the rule *nisi* was granted,) and would not pay the quarter's rent alleged to be due from her. The under-sheriff (according to the affidavit on the part of the defendant) told the jury that, the agreement being proved, the defendant's not having taken possession was of no consequence; and the jury found a verdict for the plaintiff.

Quain showed cause against a rule which had been obtained by *Stammers*, to set aside the verdict on the ground of misdirection.— The under-sheriff did not direct the jury in the manner stated in the affidavit on the part of the defendant. He told them, as the affidavits on the part of the plaintiff show, that it was not necessary to have an actual occupation, but that a constructive occupation would do. This direction was in consequence of the evidence given at the trial, namely: that the contract was made; that the key of the house was held by the plaintiff's agent at the disposal of the defendant; and that, while the repairs were going on, the defendant went into the house and told one of the workmen to keep the hall-staircase of a lighter color. This showed a constructive occupation on the part of the defendant.

[MAULE, J. The repairs were to be done by the landlord, and she might superintend them without taking possession.]

A bare entry is sufficient to vest the estate. *Lowe v. Cross*, 5 Exch. 553.

[MAULE, J. That case only shows that entry is necessary, not that it is sufficient.]

JERVIS, C. J. The under-sheriff, according to the affidavit on the part of the defendant, told the jury that the not having taken possession was of no consequence; according to the affidavits of the plaintiff, he told them that an actual occupation was not necessary, but that a constructive occupation would do; but without telling them what a constructive occupation was. Whichever way, therefore, you take it, he was plainly wrong; and Mr. Quain's points, with which he has been amusing himself and the court, do not arise.

Rule absolute.

Parker v. Farebrother.

PARKER v. FAREBROTHER and others.¹

May 24, 1853.

Auctioneers — Misdescription of Property — Liability for Damages.

The plaintiff employed the defendants to sell some houses by auction, and to prepare a description of the houses. They describe two of the houses as containing three stories, whereas they contained only two. The purchaser of those two houses compels the plaintiff, under one of the conditions of sale, to make him compensation for the misdescription. The plaintiff brings an action against the defendants, the auctioneers, for the sum he had been compelled to refund to the purchaser: —

Held, that he was entitled to recover it.

THE declaration stated that the plaintiff employed the defendants as auctioneers to sell some houses by auction, and to prepare a description of the property to be sold; that the defendants contracted to sell the houses to a bidder; yet the defendants did not exercise due care in and about the preparation of a description of the property to be sold, and carelessly and negligently and improperly prepared an incorrect and improper description of the said property, and put up to be sold and contracted to sell the said property upon the said incorrect and improper description, whereby the purchaser, according to the conditions of sale, became entitled to and claimed compensation for the said error in the said description, and the plaintiff was unable to compel the said purchaser to complete the said contract according to the said conditions, and was compelled to and did make him compensation for the said incorrect and improper description, and was put to additional expense in completing the said sale, and did not obtain so much for the said property as he otherwise would have done.

Pleas — 1. Not guilty. 2. That the plaintiff did not retain the defendants for the purpose and on the terms in the declaration alleged.

The case was tried before Talfourd, J., at the first sittings in Middlesex, in Easter term, and it then appeared that the defendants had been employed by the plaintiff, through his attorney, to sell some houses by auction, and that they had misdescribed two of the houses, stating that they contained three stories, whereas they contained only two. A Mr. Bennet purchased the two houses which were wrongly described, and afterwards claimed compensation from the plaintiff under one of the conditions of sale, by which compensation was to be made to the purchaser for any error in the description, and received between 40*l.* and 50*l.* on that account. This sum, it was contended, ought to be repaid to the plaintiff by the defendants, by whom the mistake was made. It was contended for the defendants that Bennet, the purchaser, knew how many stories the houses contained,

¹ 21 Law Times, 128; 1 Common Law Rep. 827.

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tiff might continue an adulterous intercourse with the said E. At the trial, the plea was proved, and the verdict thereon entered for the defendant:—

Held, on motion to enter judgment for the plaintiff *non obstante veredicto*, that although the plea did not show that the representations set out were necessarily fraudulent, it not being alleged that the plaintiff knew them to be false, or that he knew that E. was the defendant's wife at the time he had intercourse with her, yet it might be sustained as a general plea of fraud, which, after verdict, was a good answer to the action.

Held, also, that it was not necessary to allege that the wife, as *cestui que trust*, was a party to the fraud upon the defendant, as a court of law can only look to the legal rights of the parties to the deed.

Seemle, per Maule, J., that if the plaintiff, intending to deceive the defendant for the plaintiff's own advantage and the defendant's disadvantage, induced the latter to make the deed by representing a fact to be true which was not true, but about which the plaintiff knew nothing, that would amount to fraud, and avoid the deed.

THE declaration stated that by indenture of the 11th of January, 1844, between the defendant of the first part, Emily Elizabeth, wife of the defendant, of the second part, and the plaintiff of the third part, the defendant did for himself, his heirs, executors, and administrators, covenant with the plaintiff, his executors and administrators, that he, the defendant, would, during the joint lives of the defendant and his wife, pay to the plaintiff, his executors, administrators, or assigns, the clear yearly sum of 59*l.* 19*s.* 6*d.*, by four equal quarterly portions, on the 4th of February, the 4th of May, the 4th of August, and the 4th of November in every year. Breach, that the defendant did not pay, and that there is now due 29*l.* 19*s.* 9*d.* in respect of two quarterly payments respectively due to the plaintiff heretofore, and during the life of the said Emily Elizabeth, to wit, on the 4th of February and the 4th of May, 1852.

The defendant cravedoyer, and after setting out the deed (from which it appeared that differences had existed between the defendant and his wife, and that they had agreed to live separate, and that the annuity was to be paid to the plaintiff, as trustee for the wife, for her future maintenance,) pleaded, *non est factum*. Secondly, that he was induced to enter into and to make the said indenture, and to covenant, as in the declaration alleged, through and by means of certain false and fraudulent misrepresentations of the plaintiff, by him made to the defendant in that behalf, that is to say, by the plaintiff, before and at the time of the making of the said indenture by the defendant, falsely and fraudulently representing to the defendant, that the said Emily E. Edmonds, the wife of the defendant, was a person of virtuous, moral, and modest conduct and behavior, and that the plaintiff, who then was, and still is, a married man, and the father of divers, to wit, six children, lawfully begotten, was a person of virtuous, moral, and modest conduct and behavior, and a fit and proper person to act as a trustee for and on behalf of the said Emily E. Edmonds, for the purposes in the said indenture mentioned and contained, and for the defendant to covenant with as in that behalf in the declaration and the said indenture respectively mentioned, whereas in truth and in fact the said Emily E. Edmonds was not then a person of virtuous, moral, or modest conduct or behavior, nor was the plaintiff then a person of virtuous, moral, or modest conduct or

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conditions on which it was sold; and the jury have not given any thing for the extra expense which the plaintiff alleges he was put to.

JERVIS, C. J. I am of opinion that this rule ought to be discharged. The plaintiff had to pay the money to Bennet, and has sustained injury; and the jury have found that he had to do that without the power of avoiding it; that Bennet did not know that the houses were misdescribed, and that the plaintiff could not prove that he knew of it. The loss of the plaintiff was occasioned by the misdescription in the particulars; and the defendants, who were in fault, and were the cause of his sustaining the loss, ought to make it good. Perhaps Bennet may have known he would get the property for less than its real value by the compensation he would get. If the jury had separated the damages given for each house, the point as to reducing the damages to 23*l.* 15*s.* might have arisen; but they have given damages generally, and the court cannot distinguish them.

MAULE, J. I am of opinion that the defendants were guilty of negligence that might be productive of injury to the plaintiff. The evidence shows that, and even that there is a probability that it was, and the jury have found that it was. They have assessed the damages at 47*l.* 10*s.* They probably thought that Bennet would have given the sum he did if the houses had been properly described, but took advantage of the condition for compensation. That is one way the injury might have arisen. It might have arisen in some other way. I think they have come to a sound conclusion.

CRESSWELL, J. I am of the same opinion. Owing to the misdescription, the defendants entitled Bennet to claim compensation, and they are responsible for that.

TALFOURD, J., concurred.

LAFONDE v. RUDDOCK.¹

May 25, 1853.

Statute of Limitations, 21 Jac. 1, c. 16, s. 7.

A foreigner who has never been in this country, having a cause of action which accrued to him while abroad, against a person in this country, has six years within which to bring an action in this country, from the time he first comes to this country.

THIS was an action on a bill of exchange.

¹ 21 Law Times Rep. 129; 1 Common Law Rep. 339; 17 Jur. 624; 22 Law J. Rep. (N. S.) C. P. 217.

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Plea, the statute of limitations.

Replication, that at the time the cause of action accrued the plaintiff was beyond seas, and commenced the action within six years after he first returned to England.

Crowder, Q. C., now applied to the court to be allowed to plead, in addition to a traverse of the replication, that the cause of action accrued in France; that the plaintiff had sued the defendant in France; and that the original cause of action had become merged in the judgment recovered in the French courts.

[JERVIS, C. J. You ought to have pleaded that to the declaration. Having relied on the statute of limitations in your plea, you would be guilty of a departure were you to rejoin as you propose.]

Then I would ask to be allowed to rejoin, in addition to the traverse of the replication, that the debt accrued abroad, that the plaintiff was domiciled abroad, and never had been in this country, and did not return to this country. It is intended to raise the question whether the exception in the statute of James, as to persons beyond seas at the time of the action accruing, applies to foreigners who had never been in this country. The words of the statute are, "If any person entitled to such action of, &c., shall be at the time such cause of action accrued within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, such person shall be at liberty to bring the same actions within such times as are before limited after their being of full age, discover, of sane memory, at large, and returned from beyond the seas." The plaintiff in this case cannot return, not having been in this country before, and the exception applies only to persons who can be said to return.

[MAULE, J. Before the statute of James there was no limit to the time within which an action might be brought; and is it not, in those cases where the legislature could not conveniently put a limit, left as it was by the common law?]

The statute seems to be general, and the exception will only apply to a person who has been in this country, and can therefore return to it.

[JERVIS, C. J. *Williams v. Jones*, 13 East, 439, is against you.]

In that case it was not necessary to decide the question; and, although *Strithorst v. Græme*, 2 Wm. Bl. 723, and 3 Wilson, 145, is in point and against us, we are anxious to have the question again discussed.

JERVIS, C. J. As to the application as it was originally framed, to rejoin that the cause of action was merged in the foreign judgment, that would be a departure from the plea of the statute of limitations, and no answer to the replication; and, as to the application in its new shape, I think that the construction sought to be put upon the word "returned," in the statute, a very strict one, and such as the court ought not to recognize. Mr. Crowder says that the case of *Williams v. Jones*, where the court decided that the statute of limitations does not apply in such a case as this, is not in point, and that

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it was not necessary for the court so to decide; but, however that may be, *Strithorst v. Græme* is precisely in point. That was a case upon promises. Pleas, *non assumpsit* and *non assumpsit infra sex annos*. Replication, that before and at the time when the cause of action accrued the plaintiff was beyond sea, and hath so remained ever since, and had not been within the kingdom of England since the same accrued: to which the defendant demurred. But the court held that, "if the plaintiff is a foreigner, and doth not come to England in fifty years, he still hath six years after his coming into England to bring his action; and if he never comes to England himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. An infant may sue before he comes of age, if he pleases; but if he does not, he has six years after he comes of age to bring his action. While any of the disabilities mentioned in the statute of limitations continue, the party may, but is not obliged to, commence his action. The statute does not run while any of these disabilities continue." I think that is the proper construction of the statute. It is one of procedure; and when a foreigner comes into this country he is to be governed by it; but while abroad he is not. The fair meaning is, that an action should be commenced within six years; but if the party is abroad, he shall have six years from the time he comes into this country.

MAULE, J. I think this is a clear case. The previous section limits the time; and then the 7th section provides that persons under certain disabilities "shall be at liberty to bring actions within such times as are before limited after their being of full age, &c., and returned from beyond seas, as other persons having no such impediment should have done." I think the words "as other persons having no such impediment should have done" throw light on the word "returned," and show that the intention of the statute is that persons under impediment shall have a limited time to bring the action from the time of the impediment being removed, and that the statute runs against them from that time. That is supported by the cases quoted and by common sense. The courts have taken notice of the scope and intention of the statute of limitations; and I think that that scope and intention is that the persons under impediment shall have an indulgence, which shall be removed at certain times.

CRESSWELL and WILLIAMS, JJ., concurred.

No order.

Oldacre v. Smith. Arnold v. Ridge.

●

OLDACRE v. SMITH.¹

May 27, 1853.

Attachment — Affidavit.

The affidavit upon which a rule *nisi* for an attachment for not paying a sum awarded by an arbitrator is moved for, must directly negative the payment of the money at the particular time and place mentioned in the award.

Hayes moved for a rule *nisi* for an attachment. The defendant had not paid the sums awarded by an arbitrator. The award said that the plaintiff was to go at a certain time to a certain place for payment. The affidavit states that the plaintiff went to the place and personally served the defendant, and that the defendant did not then pay him, and has not since paid him, and that the money still remains unpaid.

JERVIS, C. J. In the case of an attachment we must be very strict. A refusal to pay at the time and place is not alleged. It may be that the defendant was at the place at the time mentioned ready to pay, and the plaintiff knew it, and wished to catch him at a time when he was not prepared to pay it. Let it stand over for the affidavit to be amended.

ARNOLD v. RIDGE AND PARSONS.²

May 31, 1853.

Municipal Corporations Act, 5 & 6 Will. 4, c. 76 — Construction of s. 92 — What property seizable for debts due from the old corporation.

Property acquired by a municipal corporation after the passing of the stat. 5 & 6 Will. 4, c. 76, is not liable to be taken in execution for debts due before that period.

THIS was a special case for the opinion of the court upon the point whether the plaintiff, who had since the passing of the Municipal Corporations Act obtained judgment against the corporation of Gravesend for a debt due before that act, and had taken in execution of such judgment a lease belonging to the corporation, and which the

¹ 21 Law Times Rep. 142.

² 21 Law Times Rep. 141; 22 Law J. Rep. (N. S.) C. P. 235; 17 Jur. 896; Common Law Rep. 309.

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latter had acquired since the passing of that act, was justified in so doing.

Cowling, for the plaintiff. The 92d section of the 5 & 6 Will. 4, c. 76, enacts "that, after the election of the treasurer in any borough, the rents and profits of all hereditaments, and the interest, dividends, and mutual proceeds of all moneys, dues, chattels, and valuable securities belonging or payable to anybody corporate in conjunction with the said borough in the said schedules A. and B., or to any member or officer thereof in his corporate capacity, and every fine or penalty for any offence against this act (the application of which has not been already provided for,) shall be paid to the treasurer of such borough; and all the moneys which he shall so receive shall be carried by him to the account of a fund to be called "The Borough Fund:" and such fund, subject to the payment of any lawful debt due from such body corporate to any person, which shall have been contracted before the passing of this act, and unredeemed, or so much thereof as the council of such borough from time to time shall be required or shall deem it expedient to redeem, and to the payment, from time to time, of the interest of so much thereof as shall remain unredeemed, and saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon the real or personal estate of any body corporate by virtue of any proceedings, either at law or in equity, which have been already instituted, or which may be hereafter instituted, or by virtue of any mortgage or otherwise, shall be applied towards the payments of the salaries of the mayor," &c. The intention of the legislature was to leave undisturbed all *bond fide* debts or contracts relating to the corporate property: (*Holdsworth v. Mayor of Dartmouth*, 11 Ad. & E. 490.) The meaning of the proviso is "nothing herein contained shall extend the liability of the corporation." A creditor, before the act, had a lien upon the borough fund.

[CRESSWELL, J. Does it not in one sense make liable now property that was not liable before? Thus tolls must go to the borough fund, and that fund is made liable to debts.]

I submit, in the first place, that this section does not exempt this property; and, secondly, the debt here is the judgment, and the court will not look to the cause of action on which the judgment was obtained.

Bramwell, contra. The general policy of the act was, that the new corporation should take the property and not be at liberty to spend it, but to take the annual income. It was also reasonable that the new corporation should take the property subject to the debts of the old corporation specifically charged thereupon. The borough rate would, if the construction contended for on the other side be the correct one, be made liable to debts, and goods and chattels bought with the corporation fund would be liable to be seized.

[MAULE, J. This is the same corporation; it was so decided in the case of the corporation of Lynn.]

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The 92d section entirely changes the nature of this corporation.

[MAULE, J. The word in the section is "unredeemed," and that seems to apply to debts for which a pledge has been given.]

Pallister v. Corporation of Gravesend, 19 Law. J. Rep. (N. S.) C. P. 358; *Ex parte Corporation of Hyde*, 4 Y. & Col. 55, decide that the corporation can only apply the annual produce in discharge of debts.

[MAULE, J. If the debt has been contracted before the act, it is equitable that the property of the old corporation should pay it.]

Cowling, in reply.

JERVIS, C. J. I am of opinion that the lease of the ferry was not seizable. The question turns upon the 92d section of the act, 5 & 6 Will. 4, c. 76. Mr. Cowling says that the words "subject to the payment of any debt" would make after-acquired property liable. The word "unredeemed" gives a clue to that part of the clause; it applies only to property subject to mortgage or other specific charges. It is not unreasonable to say that whilst you are creating a fund out of the real estate you save all rights and interests therein. But for the reason of preventing former creditors, the proviso was introduced. Those words are large enough to include the property in question. It is said this is not intended to extend to that class of cases at all. But it would be against the policy of the act to hold that. I am therefore of opinion that the plaintiff cannot recover.

MAULE, J. I am of the same opinion. The clause preserves the rights of all persons. If that had stood alone, it would have followed that the creditors of the old corporation would have been able to enforce their debts, though worthless, against the inhabitants of the town. The remedy for the new debts is to be general; but it was necessary to have a proviso limiting the liability. You should give to words in acts of parliament the meaning they actually bear, unless that could not have been intended by the legislature, because of an evident inconvenience. There is no question of this sort here. The construction contended for by the plaintiff makes the words nugatory.

CRESSWELL and TALFOURD, JJ., concurred.

Judgment for defendant.

Walter v. Brandeis. Cork and Bandon Railway Co. v. Goode.

WALTER v. BRANDEIS.¹

April 28, 1853.

New Trial — Surprise.

An affidavit on which to found a motion for a rule *nisi*, on the ground of surprise, should state, not only that the evidence adduced at the trial was unexpected, but that the party on whose behalf the application is made, would have been prepared, had it not been for the surprise, with evidence to contradict the evidence adduced.

THIS case was tried before Talfourd, J., in London. The action was for work and labor.

Plea, never indebted. Verdict for the plaintiff, damages 75*l*.

Montague Chambers, Q. C., moved for a rule to show cause why the verdict should not be set aside as against evidence, and also on the ground of surprise. The question was, whether the defendant had employed the plaintiff to do the work.

The court were of opinion that the verdict was not against the evidence, as it stood; and that the affidavit of the defendant stating that unexpected evidence was adduced at the trial was not sufficient, as it ought to have stated further, in order to induce the court to grant a rule, that, had it not been for surprise, the defendant would have been prepared with evidence to contradict it.

Rule refused.

CORK AND BANDON RAILWAY COMPANY v. GOODE.²

May 4 and 31, 1853.

Action for Calls — Statute of Limitations.

In an action for calls, a plea, that the action was on contracts without specialty, and that the causes of action did not accrue within six years: —

Held, issuable; but afterwards,

Held bad on demurrer.

Quære, whether a plea that the shares were forfeited, and that the company had received sufficient thereupon to pay the calls, is issuable?

Udall had obtained a rule calling upon the plaintiff to show cause why the judgment signed in this case should not be set aside. The action was for calls, and the declaration was in the statutable

¹ 21 Law Times Rep. 90.

² 1 Common Law Rep. 345; 17 Jur. 555 and 1057; 22 Law J. Rep. (N. S.) C. P. 147. Before JERVIS, C. J., CRESSWELL, C. J., WILLIAMS, J., and TALFOURD, J.

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form prescribed by the Companies Clauses Act, 8 Vict. c. 16, s. 26. It stated that "the defendant is the holder of thirty shares in the said company, and is indebted to the said company in 825*l.* in respect of nine calls; that is to say, seven calls of 2*l.* 10*s.* each, and two calls of 5*l.* each upon each of the said shares, whereby an action hath accrued to the said company by virtue of 'the Company's Clauses Consolidation Act,'¹ and 'the Cork and Bandon Railway Act, 1845,' 8 & 9 Vict. c. 122. See also 10 Vict. c. 194, 15 Vict. c. 35, but the defendant hath not paid the same," &c. The abstract of pleas proposed was as follows:—1st. Never indebted. 2d. The Statute of Limitations. 3d. That defendant did not hold the shares. 4. That the shares were forfeited, and that the company received sufficient to pay the calls. The second plea was delivered in the following form: "That the action is upon contracts without specialty, and that the alleged causes of action did not accrue at any time within six years."

The plaintiffs thereupon signed judgment, and on a summons to set it aside, Maule, J., held it had been rightly signed upon that plea. When the rule *nisi* was obtained, the case of *The Tobacco Pipe Makers' Company v. Loder*, 15 Jur. 1154; s. c. 6 Eng. Rep. 209, was cited, in which such a plea was held good on special demurrer.²

Byles, Sergt. and *Beasley*, now showed cause. This plea is not issuable. It is as though the defendant had pleaded in debt that the action was for slander, and that the cause of action had not arisen within two years. This is an action on a statute, and so is on a specialty.

[JERVIS, C. J. You must show more than that the statute gives a form of declaration.]

It has been decided that, in an action on the statute for not setting out tithes, the Statute of Limitations could not be pleaded. *Taylor v. Jackson*, Cro. Car. 513.

[WILLIAMS, J. For that it was confined to actions of debt grounded upon a lending or contract without specialty.]

The plea raises an issue of law, whether the action is founded on specialty; it would be impossible to traverse the allegation that it is not founded on specialty, and to demur would be to admit it.

[JERVIS, C. J. On demurrer, or after verdict, judgment would be given on the whole record.]

But if it were found against the plaintiff on the trial, it would be a bad plea, and he must move for judgment *non obstante veredicto*.

[JERVIS, C. J. It is impossible we can determine it to be a bad plea on a mere motion.]

The plea is not in accordance with the abstract. The sixth plea also is unissuable.

¹ 8 & 9 Vict. c. 16, which the Cork and Bandon Railway Act incorporates. The act requires a register, (sect. 7,) and certificates (sect. 11) of shares; the certificates being under the common seal of the company, and *prima facie* evidence of the title of the shareholder and his assigns, (sect. 12). All transfers are to be by deed, (sect. 16).

² But there the action was on a by-law.

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[JERVIS, C. J. I should have thought that certainly more like an unissuable plea than the other.]

It is not alleged that the money was applied in satisfaction of these calls, and until satisfaction there is no bar to an action. *Great Northern Railway Company v. Kennedy*, 4 Exch. 425.

Udall, in support of the rule. The learned judge held the fourth plea was not unissuable, and acted on the second, which clearly is a good plea.

[WILLIAMS, J. Why do you not plead the statute in the common form?]

Because then, on demurrer, it would be said *non constat* that the cause of action is founded on simple contract, and as a matter of fact it was necessary to show that the action is based upon specialty. If a plea is not clearly bad on general demurrer, it is issuable. *Mac-kay v. Wood*, 7 M. & W. 420. In *Bousfield v. Edge*, 1 Exch. 89, it was said *per Curiam*, "How can it be said that a plea which is only bad on special demurrer is not a plea to the merits?" But this plea has been held good on special demurrer. *Tobacco Pipe Makers Company v. Loder*, 15 Jur. 1194; s. c. 6 Eng. Rep. 209.¹

Per Curiam. Rule absolute, without costs.

The case afterwards came on for argument upon demurrer.

Beasley, (with him *Byles*, Sergt.,) for the plaintiff. The plea is bad. The action is upon "specialty;" for it is founded on the statute. The plea admits that the defendant was a proprietor as defined in the statute. It has been held on an analogous declaration for calls under the Joint Stock Registration Act, 7 & 8 Vict. c. 110, that the action was not on the deed but on the statute. *Agricultural Cattle Ins. Co. v. Fitzgerald*, 16 Q. B. 432; s. c. 4 Eng. Rep. 211. The statute of James uses the words, "actions founded on contract;" but it has been laid down that the obligation in such a case as this is "enforced by the statute." *South Staffordshire Railway Co. v. Burnside*, 5 Exch. 137; s. c. 2 Eng. Rep. 418. The case of *Taylor v. Jackson*, in which it was held that debt on the statute of Edward Sixth, as to tithes, was not within the statute of James, was followed in *Warren v. Consett*, 2 Ld. Raym. 1512; and it was cited in *Jones v. Pope*, 1 Saund. 38, where it was held that debt for an escape was not within the statute; and there Jones, Sergt., *arguendo*, said, the reason was, that the action was founded on specialty, because it was founded on the statute.

[JERVIS, C. J. There it was also argued that it was not founded on any contract on lending; and Saunders says, that, "for the reasons

¹ Under the Common Law Procedure Act, sect. 51, no pleading now is demurrable on grounds of special demurrer; but may be embarrassing, and so unissuable. And see *Linwood v. Squire*, 5 Exch. 234; *Steele v. Harmer*, 14 M. & W. 136.

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given by Jones, the court held the plea bad, and the action not within the statute."¹]

It is submitted that, on the principles affirmed in the cases cited, this is an action founded on the statute; and that it is as though the defendant had signed and sealed a deed containing all the provisions of the statute. Then the latter part of the plea is nought, alleging that the action "is founded on contracts without specialty;" for it appears upon the declaration that, as matter of law, this could not be so. It is as though in an action of covenant there had been a similar plea.

Udall, for the defendant. The plea is good. The declaration is upon a "contract without specialty;" and *assumpsit* would lie. It is not an action upon the statute; it is an action for calls made by the plaintiffs in pursuance of powers conferred by the statute. The call itself is not a specialty, it is mere matter of fact; and, though the defendant might be liable by a specialty, there are several ways in which he might be liable without specialty. There is no deed executed by the shareholders between themselves and the company. From the *Great Northern Railway Company v. Biddulph*, 7 M. & W. 243, it should seem that the action for calls is one of simple contract, even as against the original shareholders.² A shareholder may be liable for calls in many ways. 1st. As being a person who has subscribed the parliamentary contract. 2dly. As assignee of such person, although such subscriber assigned before the formation of the register of proprietors. 3dly. As the allottee of new capital not subscribed for in the parliamentary contract. 4thly. As the transferee of the original shareholders. 5thly. As the allottee of forfeited shares. No deed is ever signed binding the shareholders to pay to the company. The case of *The Sheffield Railway Company v. Woodcock*, 7 M. & W. 574, is not the only case to show that a person may be liable to calls on an implied promise. In the *South Staffordshire Railway Company v. Burnside*,³ 5 Exch. 137; s. c. 2 Eng. Rep. 418. *Sed vide Birkenhead, Lancashire, and Cheshire Railway Company v. Pilcher*, 5 Exch. 24; s. c. 5 Eng. Rep. 522, Parke, B., speaks of the obligation as "created by contract."

[JERVIS, C. J. It is clear that the shareholder may be liable without specialty; but it is not so apart from the statute.]

It is submitted that he is not liable simply by the statute, but by the contract he makes with the company.

[CRESSWELL, J. What contract does he make with the company?] It is by parol.

¹ But Saunders, who himself argued *à contrâ*, admitted that the action was not on a "lending or contract." The case was really decided on the question, whether it was on the statute.

² *Quære*, whether the court only held that, after verdict, the declaration was not bad for not stating that the subscription was by deed.

³ *Per Cur.* This obligation created by statute cannot be described as a contract.

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[CRESSWELL, J. How and when is it made?]

Upon the application for shares, and the undertaking to pay the calls.

[CRESSWELL, J. How can that undertaking arise, without the statute?]

It cannot arise without the statute, but still it does not arise upon the statute *per se*; it is founded partly upon other matters of fact, as the call.

[MAULE, J. So it is in every case of an action founded on a statute. There can scarcely be a case of an action founded on a statute *per se*; there are always facts *dehors* the statute.]

The defendant is liable because he has contracted,

[MAULE, J. No; but because he is a shareholder; the statute, without any thing more, imposes upon him a liability to pay such calls as are made.]

It is laid down that *indebitatus assumpsit* may lie upon a statute; where an act gave power to commissioners to make orders upon a division of common fields, and they awarded that allottees should pay in certain cases so much an acre. *Bell v. Burrows*, Bull. N. P. 129. The principle is recognized in *Ram v. Green*, Cowp. 474.

[MAULE, J. There the point did not arise; the case was undecided on the misrecital of the act.]

But it is said by Lord Mansfield, in giving judgment, that the action, which was *assumpsit*, was brought in consequence of a right liquidated by means of the statute; and the same principle appears to be confirmed in *Peck v. Wood*, 5 T. R. 130.¹ And these authorities are cited in Chitty on Pleading, vol. 1, p. 119, for the proposition that *assumpsit* may be supported on a statute.² As to the cases cited by the other side with respect to actions for not setting out tithes, it is sufficient to say that such actions did not lie at common law, and of course could only be founded upon the statute. In actions upon calls it has been recently laid down that the shareholder is liable as a contractor. *North Midland Railway Company v. MacMichael*, 5 Exch. 28.

[JERVIS, C. J. That and similar cases only show that the statute itself does not constitute the contract, but an action on a call is "founded" on the statute.]

In the case of a by-law, in which a similar plea was held good on special demurrer, *Tobacco Pipe Makers' Company v. Loder*, there is as much ground to say that the action is "founded on specialty;" for a charter is one of the highest species of specialty. If the present case be not within the statute of James, as an action founded on contract, it is not within any statute of limitations, since that of William Fourth, 3 & 4 Will. 4, c. 42, s. 3, only refers to bonds, and not to actions on statutes.

¹ That was a case of contribution to a party wall.

² The words are, "for money accruing due to the plaintiff under the provisions of a statute."

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Byles, Sergt., in reply. The last argument is not well founded, for the act of William Fourth applies to actions of debt upon a bond, or other specialty. This action is founded upon the statute, and so is upon specialty. The 22d section expressly enacts, that every shareholder shall be liable to pay the calls made by the company. No action of *assumpsit* would lie for calls under this statute.

[JERVIS, C. J. Will not *indebitatus assumpsit* lie for tolls ?

CRESSWELL, J. Or port dues under charter from the crown ?]

It might lie for tolls under a by-law.

[CRESSWELL, J. But as against strangers ?]

Even if *indebitatus assumpsit* would lie in such cases,¹ debt on the charter, or the statute, might be maintained ; for it has been held, that debt may be proved by contract under seal. *Tilson v. Warwick Gas Company*, 4 B. & C. 962.

[MAULE, J. The case of a charter is different from that of a statute.]

The *Tobacco Pipe Makers' Company's* case was one in which the action was only on a by-law.

JERVIS, C. J. I think the plea is no answer to the action, for the action is founded upon the statute, and not on a contract without specialty. It is true that parties may become shareholders in several ways ; by contract imposing a liability to pay the calls, or by contract imposing no such liability. But for the statute, however, no action could be brought by the company against members of its own body. The 22d section of the statute says, " That when the party is a shareholder upon the registry, he shall pay all the calls which are made." That is a liability created by the statute ; it is, therefore, an action founded upon specialty ; and the plea that no cause of action arose within six years is bad.

MAULE, J. I also think the plea is bad. The declaration alleges that the defendant is indebted in respect of calls, whereby an action hath accrued to the company by virtue of the Companies Clauses Act of 1845 ; the declaration, therefore, is clearly a debt upon the statute ; and such a declaration is upon a specialty. It is not the less upon a specialty, because the facts which bring the case within the liability created by the statute are *dehors* the statute ; for that is the case in every action of covenant, and is so in cases where the action is clearly upon statute. If this be so, then the allegation in the plea, that the action is not founded upon specialty, is merely a false allegation of matter of law. It is unquestionable that there may be cases in which a statute expressly or impliedly enables an action of *assumpsit* to be brought under powers conferred by an act of parliament ; but

¹ The precedents are both in debt and *assumpsit*. See Chitty on Pleading, vol i, p. 114 ; vol ii, p. 48, 293. See *Company of Feltmakers v. Davis*, 1 B. & P. 102, where it is said, per Eyre, C. J., " It is extraordinary that the general counts should have been held good in cases of tolls ; the claim upon penalty under a by-law arises by something in the nature of a specialty."

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ere it appears clearly on the face of the declaration, that this is an action of debt on a specialty. There is no difficulty, therefore, as to the Statute of Limitations applicable to the case, for it comes within the terms of the act of William Fourth, "bonds or other specialties;" and which include actions founded on statutes. But, even if this were otherwise, it would be, in my opinion, no argument to alter our judgment, for there are other cases in which the law has left us without any limitation of right of action, and the only consequence would be, to add this to them.

CRESSWELL, J. I think it is plain, upon the declaration, that this is an action on a statutable liability to pay money, and that the defendant is not at liberty to allege, that the action is founded upon contract without specialty, when the contrary appears upon the declaration.

TALFOURD, J. The relation of the shareholder to the company is altogether an artificial relation, created by statute, regulated by statute, and with remedies given by statute; and I think that such an action is founded on statute."¹

Judgment for plaintiffs.

FLACK v. THE MASTER, FELLOWS, AND SCHOLARS OF DOWNING COLLEGE, CAMBRIDGE.¹

June 9, 1853.

Copyhold — Surrender to Uses — Admittance — Lord's right to Tenant on the Roll.

A copyhold tenant cannot compel his lord to accept and enrol a surrender "to such uses and in such manner as A shall appoint," which surrender is executed and to take effect in the lifetime of the copyhold tenant.

Difference between a surrender to uses under a will, and a surrender to the uses of a nominee *inter vivos*, — the former being founded on a custom, the latter without authority.

This was a special case, stated by consent of parties for the opinion of this court, without formal pleadings, pursuant to 15 & 16 Vict. c. 76, s. 46.

The plaintiff, who is customary tenant of the manor of Tunbridge, in Bottisham, in the county of Cambridge, brought his action against

¹ Where the action was solely on the statute *per se*, it was not deemed necessary to do more than allege that the defendant owed the money; but where it arose also from facts *dehors* the statute, it was usual to say, "*per quod actio accrevit*." Gilb. Debt. 414. In either case it was an action of debt on the statute. Chitty on Pleading, vol. i, p. 375.

² 21 Law Times Rep. 335; 23 Law J. Rep. (N. S.) C. B. 229; 17 Jur. 697; 1 Com. Law Rep. 652.

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the defendants, the lords and stewards of the said manor, to recover damages for an alleged breach of duty and wrongful acts of the defendants in refusing to receive and enrol, on the court rolls of the said manor, the conditional surrender or instrument in writing, the tenor whereof is hereinafter set forth: —

Case — The manor of Tunbridge, in Bottisham, is an ancient manor, containing divers copyhold tenements and hereditaments, descendible from ancestors to heirs as of hereditary right of the tenants, held of the lords or lord for the time being, by the rolls and by copy of court-roll, at the will of the said lords or lord, according to the custom of the manor, by certain rents, suits thereon due and of right accustomed.

The copyhold tenements and hereditaments have been and may be surrendered by the tenants for the time being to the use of any person or persons named or designated in the surrender, and for such estates, and subject or not to any such conditions as might be lawfully expressed or mentioned in and by the surrender or instrument in writing made upon the occasion of any such surrender. At no time heretofore from time whereof the memory of man is not to the contrary, has any conditional or other surrender to the following effect (that is to say) to such uses and in such manner as the surrenderee therein named (whether a mortgagee or purchaser) should (within a specified time or otherwise) appoint, and in default of and until appointment to the use of such surrenderee, his heirs and assigns forever, according to the custom of the said manor, and by the rents, suits, and services, due and of right accustomed, or to the like effect; nor any surrender or instrument in writing in such form as that the tenor whereof is hereinafter set forth, or to the like effect, ever been enrolled in the court-rolls of the said manor. But wills, containing powers for the executors and trustees thereof, for the time being, to bargain and sell and otherwise dispose of the testator's copyholds, without their admission thereto, have been constantly enrolled and acted upon.

Nor is there any special custom of the said manor prescribing any particular fee of surrender, and there are enrolled upon the court rolls of the said manor many surrenders to the following effect; (that is to say,) to such uses as the surrenderor or any other person therein named had then already or should thereafter, by his or her last will or testament in writing, appoint.

Before and at the time of making the conditional surrender, the tenor whereof is hereinafter set forth, the defendants, the Master, Fellows, and Scholars of Downing College, were, and still are, the lords of the said manor, and the defendant Clement Francis then was and still is the steward of the said manor and of the courts hereof. The plaintiff was seised in his demesne, as of fee, at the will of the defendants, the Master, &c., of Downing College, as lords of the said manor, for the time being, according to the custom of the said manor, of the copyhold allotment mentioned in the said surrender and therein expressed to be surrendered, with the appurtenances, the same being parcel of the said manor, and to which allotment the plaintiff was duly admitted tenant.

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The plaintiff being seised on the 3d July, 1852, made and executed a conditional surrender, the tenor whereof is as follows:—
“Manor of Tunbridge, in Bottisham, in the county of Cambridge. Be it remembered, that on the 3d July, 1852, Richard Flack the younger of Bottisham, aforesaid, farmer, a customary tenant of the said manor, in pursuance of his covenant in that behalf contained, in a certain indenture of mortgage bearing even date herewith, and expressed to be made between the said Richard of the one part, and Edmond Foster of the other part, did out of court by the rod surrender out of his hands into the hands of the lord or lords, &c., by the hand and acceptance of Edward Parker and Thomas Hatley, two like customary tenants of the said manor, according to the custom thereof, all the allotments of land, &c., (describing it,) together with all the rights, members, and appurtenances to the said allotment of land belonging or appertaining, and the reversions, &c., and all the estate, &c., to such uses and in such manner as the said Edmond Foster, his executors, administrators, or assigns at any time, from time to time during the lives of the said surrenderor and Edmond Foster, or the life of the survivor of them, or within twenty-one years of the decease (inclusively) of such survivor, shall, by any writing or writings under his or their hands appoint, and in default of and until appointment to the use of the said Edmond Foster, his heirs and assigns, forever, according to the custom of the said manor, &c.: provided always that in case the said surrenderor, his heirs, executors, administrators, and assigns, shall on the 3d June next pay unto the said Edmond Foster, his executors, administrators, or assigns 600*l.*, with interest at 5 per cent. per annum from the date hereof, &c.; then this surrender shall be void and of no effect, otherwise shall remain in full force and virtue. (Signed) Richard Flack, jun.”

This surrender was accepted and taken by Edward Parker and Thomas Hatley. The plaintiff, being so seised on the 3d July, 1852, did, according to the custom of the said manor, out of court by the rod surrender out of his hands into the hands of the defendants, the Master, &c. of Downing College, by the hands and acceptance of Edward Parker and Thomas Hatley, the said copyhold allotment, with appurtenances, to such uses, and in such manner and form (so far as lawfully might be,) according to the custom of the said manor.

From time immemorial the lord or lords of the said manor and the steward have accepted and enrolled on the court rolls, and of right ought so to accept and enrol, all conditional surrender by way of mortgage duly made of any of the said copyhold tenements and hereditaments, parcel of the said manor, upon such surrender respectively being duly tendered for that purpose, together with the lawful fee of and incident to such enrolment; and such enrolment is necessary for the purpose of rendering any such surrender a safe and valid security.

The plaintiff, being desirous of having the said conditional surrender duly enrolled, tendered the same to the defendants, for the purpose of the same being enrolled, and then tendered the lawful fees

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incident to such enrolment, and then requested the defendants to receive and enrol the said conditional surrender. But the defendants each of them refused, and still do refuse, to accept and enrol it, because of the following words contained in the said conditional surrender, that is to say, "to such uses, and in such manner, as the said Edmond Foster, his executors, administrators, or assigns at any time, or from time to time during the life of the said surrenderor and Edmond Foster, or the life of the survivor of them, or within twenty-one years of the day of the decease (inclusively) of such survivor, shall by writing or writings under his or their hands appoint, and in default of and until appointment," &c.; to which words the defendants respectively then and there wholly objected; but the defendants admit that, in all other respects, the said conditional surrender is in the common and usual form, and unobjectionable.

The court is to be at liberty to draw any inference or find any facts which, in the opinion of the court, a jury ought to have drawn and found.

The question for the court is, whether it was the duty of the defendants, or either of them, to receive and enrol on the court rolls of the said manor the said conditional surrender, the tenor whereof is hereinbefore set forth.

If the court shall be of opinion in the affirmative, then judgment shall be entered into for the plaintiff, for 40s. damages, with costs of the action. If the court should be of opinion in the negative, then judgment shall be entered for the defendants, with costs for the action.

Byles, Sergt., (*Wortledge* with him) for the plaintiff, cited the following cases: — *Matthews v. Osborne*, 20 Eng. Rep. 238; *Beale v. Shepherd*, Cro. Jac. 190; *Holdfast v. Preston*, (the leading case upon the subject,) 2 Wils. 400; *Glasse v. Richardson*, 9 Hare, 698; s. c. 15 Eng. Rep. 202; *Regina v. Oundle*, 1 A. & E. 283; *Regina v. Dullingham*, 8 A. & E. 858; *Regina v. The Dean and Chapter of Ely*, (MS. note, furnished by Mr. Sweet); *Peachey v. The Duke of Somerset*, 1 Strange, 446. In the course of Serg. Byle's argument, Hill, Q. C., for the defendants, admitted that if the lords had enrolled the surrender, they would be bound to admit the appointee.

Hugh Hill, Q. C., for the defendants, relied on *Edlestone v. Collins*, 20 L. T. Rep. 298; s. c. 17 Eng. Rep. 163; *Scriven on Copyholds*, edit. 1846; *Bowden v. Malster*, Cro. Chas. 42-44; *Preston* in note to *Sheph. Touch.* 505.

Byles, Sergt., in reply, referred to *Brooks's case*, Popham, 125; *Boddington v. Abernethy*, 5 B. & C. 776.

JERVIS, C. J. I am of opinion that the lords in this case were not bound to accept the surrender, and therefore there must be judgment for the defendants. There are no cases in the books bearing directly upon this point; but there are several cases on a similar point under

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a will, amongst which are *Holdfast v. Preston*, and some others. Where there is a surrender under a will, the surrenderor has a right to name a person on whom he may create a power to sell. He has furthermore a right to appoint a person by will who shall have power to name another, and the person so named will be in the same position as if he were actually named in the will. So, in the case of a will, it is clear that the testator has a right to confer a power on another to name a person to be entered upon the court roll. But I think that is an incident peculiar to wills, and that it does not apply to transactions *inter vivos*. The case of *Regina v. Oundle*, is the only one directly bearing upon this question. There the application was to admit the nominee. The lord acted on the surrender, and therefore adopted the instrument which created a power on the copyhold tenant; and when the lord refused to admit, he was inconsistent, for he said in effect, "You may nominate, but I will not admit;" he acted on the instrument creating the power. In *Regina v. Dullingham* the point did not arise. From this it will be seen that the point insisted on, namely, that such a transaction as this may take place *inter vivos*, is wholly without authority; the question then remains whether the copyhold tenant can force on the lord this power. It has the effect undoubtedly of depriving the lord of his fines, whether it has that of depriving him of having a tenant always on the roll or otherwise. In the absence of authority, you have no right to compel the lord to accept a surrender *inter vivos* such as this. The defendants then were justified in rejecting such a surrender, and judgment must therefore be entered for them.

MAULE, J. I am of the same opinion. The general principle of copyhold law excludes any compulsion on the lord to accept such a surrender as this. If the plaintiff is dissatisfied, our judgment on this special case need not be conclusive; for a writ of *mandamus* may be obtained by which the objection will appear on the record, so that the case may be carried by error to the House of Lords.

CRESSWELL, J. I also am of like opinion. The only semblance of authority for the plaintiff is the case cited from the Law Times, where the L. C. seems to have intimated an opinion that the lord would be bound to accept such a surrender as this. He would no doubt have been bound to take such a surrender under a will; there is a custom prevailing in all manors to that effect; but he is not bound to do so in a transaction *inter vivos*, such as this.

TALFOURD, J., concurred.

Judgment for the defendants.

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LUCKIE v. BUSHBY.¹

June 10, 1853.

Ship and Shipping — Policy of Insurance on Goods — Partial Loss — Adjustment — Set-off — Pleading.

Declaration on a valued policy of marine insurance, underwritten by the defendant for 100*l.*, on goods from D. to L., alleging a partial loss above 5*l.* per cent. and a breach of the policy by reason of the defendant's nonpayment of the loss, or any part thereof, or of the 100*l.*, or a proportional, or any part thereof. Plea, that before action, the proportional sum which the defendant was liable to pay in respect of the loss, was, by agreement between the plaintiff and the defendant, adjusted at a certain rate per cent., and thereby then liquidated and ascertained to be a certain sum, against which the defendant is willing to set off a larger sum due to him from the plaintiff for premiums of insurance: —

Held, on demurrer, to be a bad plea; that the action was for unliquidated damages, and that the adjustment did not make them liquidated, but was only evidence for a jury of the amount of damages.

THE declaration stated that the plaintiff heretofore, to wit, on, &c., caused to be made a certain policy of insurance, purporting thereby, and containing therein that the plaintiff did make assurance and caused himself to be insured, lost or not lost, at and from Demerara to London, including all risk of craft, to and from the hereinafter-mentioned vessel, from the time the produce was water-borne from the estates from which it came, upon goods and merchandise in the good ship or vessel called The Barrick, beginning the adventure upon the said goods and merchandise from the loading thereof on board the said ship at Demerara as aforesaid, and to continue and endure until the said goods and merchandise should be arrived as aforesaid, and until the same goods and merchandise had been there discharged and safely landed; and that it should be lawful for the said ship, &c., in that voyage to proceed and sail to, and touch and stay at any ports or places whatsoever, without prejudice to that insurance; and that the said goods and merchandise, &c., for so much as concerned the assured, by agreement between the assured and assurers in that policy, were and should be valued at 3,100*l.* sterling, on sugar, valued as per indorsement on the said policy, and that touching the adventures and perils which they, the assurers, were contented to bear, and did take upon them in that voyage, they were, of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandises, or any part thereof; and that in case of any loss or misfortune, it should be lawful to the assured, their factors, servants and

¹ 22 Law J. Rep. (N. S.) C. P. 220; 1 Common Law Rep. 585; 17 Jur. 624.

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assigns, to sue, labor, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandises, or any part thereof, without prejudice to that insurance, to the charges whereof the assurers would contribute, each one according to the rate and quantity of his sum therein assured, and that the assurers were contented and did thereby promise and bind themselves each one for his own part, their heirs, executors, and goods, to the assured, their heirs, executors, administrators and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for that assurance by the assured, at and after the rate of 2*l.* 5*s.* per cent.; and that in witness thereof they, the assurers, had subscribed their names and sums assured in London. And by a certain memorandum thereunder written, corn, fish, salt, fruit, flour, and seed were warranted free from average, unless general, or the ship should be stranded; sugar, tobacco, hemp, flax, hides and skins were warranted free from average, under 5*l.* per cent.; and all other goods, also the ship and freight, were warranted free from average under 3*l.* per cent., unless general, or the ship should be stranded. And by another memorandum, written in the margin of the said policy, average was to be paid by the assurers on every ten hogsheads, running landing numbers, same as if the same had been separately insured, and the said goods were thereby warranted free of capture or seizure, and all consequences of and attempt thereof, of all which the defendant had notice; and then, in consideration of the payment by the plaintiff to the defendant, at his request, of a sum of money, as a premium for the insurance of 100*l.* by the defendant, upon and in respect of the premises upon the terms aforesaid, the defendant then became and was an insurer to the plaintiff, and duly subscribed the said policy as such insurer of the said sum of 100*l.* upon the premises. And the plaintiff says, that heretofore divers goods, that is to say, a cargo of sugar according to the said policy of insurance was shipped at Demerara in and on board of the said ship, in the said policy of insurance mentioned, to be carried therein on the said voyage. And the plaintiff was, at the time of making the said policy of insurance, and previous and at the time of loss hereinafter mentioned, interested in the said goods so shipped on board the said ship as aforesaid to the value and amount, to wit, of all the moneys by him ever insured thereon. And the plaintiff further saith, that the said ship with the said goods on board thereof set sail from Demerara aforesaid on her said voyage towards London aforesaid, and that afterwards and whilst the said ship was proceeding on her said voyage, and before her arrival at London aforesaid, the said goods being then on board thereof were, by perils insured against by the said policy, injured and damaged to an amount exceeding 5*l.* per cent. Yet the defendant, although a reasonable time for him so to do has elapsed, has not indemnified the plaintiff against the said loss, or any part thereof, or paid the said sum of 100*l.*, or a proportional or any part thereof, and the same remains still owing and unpaid. The declaration also contained the usual money counts.

Second plea to the first count — that before action brought the pro-

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portional sum which the defendant was liable and ought to pay in respect of the said loss, in the first count of the declaration mentioned, was by agreement between the plaintiff and the defendant settled and adjusted at a certain rate, that is to say, the rate of 7*l.* 18*s.* 4*d.* upon the 100*l.*; and that the amount payable by the defendant to the plaintiff for and in respect of the said loss was thereby and then liquidated and ascertained to be the sum of 7*l.* 18*s.* 4*d.*, and no more. And the defendant further says, that at the commencement of this suit the plaintiff was and still is indebted to the defendant in an amount exceeding the said amount so ascertained as aforesaid, for premiums of insurance upon divers policies of insurance before then effected by the plaintiff with the defendant, and underwritten at the plaintiff's request by the defendant as insurer of divers moneys upon certain risks in such policies respectively mentioned, and for money found to be due from the plaintiff to the defendant on divers accounts before then stated between them, which amount the defendant is willing to set off against the amount so settled and ascertained as aforesaid.

Demurrer and joinder therein.

C. Pollock, (Byles, Serg., with him,) for the plaintiff. The plea is bad on two grounds: first, the nature of the plaintiff's claim being for unliquidated damages does not admit of set-off. *Grant v. The Royal Exchange Assurance Company*, 5 M. & S. 439; *Castelli v. Bodington*, 1 El. & B. 66; s. c. 16 Eng. Rep. 127. The defendant cannot better his position by saying that the plaintiff might have differently shaped his claim, and treated the adjustment as an account stated. *Smith v. Hodson*, 4 Term Rep. 211; *George v. Clagett*, 7 Ibid. 259. Secondly, if the adjustment amounted in point of fact to a set-off it cannot be pleaded as such, because there was no mutual credit. An adjustment of freight was at one time considered as an absolute contract; but later cases show that the assured may treat it as a promise to pay on an account stated; but that it is only *prima facie* evidence against the defendant. 2 Arnould on Ins. 1202. The defendant will rely on *Adams v. Saunders*, Moo. & M. 373; s. c. 4 Car. & P. 25, as proving that the assured cannot claim a larger amount than that for which the underwriter has signed the back of the policy; that the adjustment cannot be contradicted.

[CRESSWELL, J. In that case Lord Tenterden seems to have thought that the fact of the name of the defendant, the underwriter, being struck out of the policy was not proof that the sum found to be due had been paid. The payment was proved *aliunde*, and the defendant had a verdict. So, the case is not an authority for or against the present defendant.]

The adjustment is not binding on the underwriter; it is only an admission on the supposition of the truth of certain facts stated that the assured are entitled to recover on the policy. It may have the effect of shifting the burden of proof from the assured to the underwriter, but does not deprive the latter of any ground of defence which either the law or facts may supply. *Shepherd v. Chewter*, 1 Camp. 274; *Herbert v. Champion*, Ibid. 134.

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[JERVIS, C. J. — I think the sum in adjustment can ever amount to more than the sum assured. It is not in dispute.]

CRESSWELL, J. — I am satisfied by the underwriter of the amount of the loss he is bound to pay.

J. Wilk. is satisfied that an adjustment of a certain amount does not deprive the assured of his remedy on the policy, yet he cannot recover a sum greater than the sum adjusted. Lord Tenterden says in *Summers* "I do not see of what use an adjustment would be if it could be opened." In that case it would seem the plaintiff was endeavouring to escape from the adjustment.

[CRESSWELL, J. referred to *Lynn v. Hall*, 4 Taunt. 725. Suppose an adjustment made by the assured under a mistake of fact. The adjustment would be no answer to an action against the underwriter on the policy.]

It is an answer until the plaintiff replies the mistake.

[JERVIS, C. J. If so, the adjustment is the answer in the plea.]

The declaration says the defendant owes an uncertain amount. The plea says, that amount has been made certain without the intervention of a jury, and that at the trial the defendant will prove that the plaintiff owes him more than that amount. Suppose the plaintiff had claimed as for a total loss, the amount due to him would then have appeared from the policy; there can be no objection in that case, the defendant should be deprived of the benefit of the same principle applies here. The only case where a set-off is not allowed, is where the amount against which the set-off is pleaded cannot be ascertained without the intervention of a jury. If it has been ascertained without that, to avoid cum gratia, a plea of set-off is allowed. The principle laid down in *Smith v. Hodgson* is not denied; but the more analogous case is *George v. Pett* where it was held, that the defendant, sued by the principal on a contract made by the agent of the latter, might set off any debt he had against the agent with whom he had contracted as principal.

[CRESSWELL, J. In that case whichever sued, the form of action would be the same, for goods sold and delivered. Here you may change, by your plea, an action for unliquidated damages into an action for liquidated damages.]

Burd v. Depeyster, 4 Camp. 385, shows that the plaintiff chooses by his choice of a particular form of action, to give up the benefit of his right of set-off. The action there was for the money due, and Gibbs, C. J. says, "The sums which the plaintiff might have recovered as money had and received, or as a debt. Therefore, they shall not deprive the defendant of the benefit of the set-off by declaring specially for not accounting."

[JERVIS, C. J. If there had only been one count there, the first, that case might have been some authority; but the declaration contained the usual money counts as well, and the set-off was only pleaded to them.]

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Grant v. The Royal Exchange Assurance Company is not an authority against the defendant; it rather assumes that if the loss had been ascertained, the plea of set-off would have been allowed. In *Wienholt v. Roberts*, 2 Camp. 586, there was an adjustment and a plea of set-off; the only objection made was the want of mutuality, which was overruled, and the set-off was allowed.

[JERVIS, C. J. Garrow, having a good objection, relied upon a bad one, and upon that only a decision was given.]

That case is thus commented upon by Abbot in argument in the case of *Cumming v. Forester*, 1 M. & S. 494: "Here if, as in *Wienholt v. Roberts*, the party had acknowledged losses to a specific amount, it might have been argued that that amounted to an adjustment, and the demand became liquidated, and in the nature of an account stated, and then, perhaps, a set-off might be allowed." In *Lear v. Heath*, 5 Taunt. 201, it was decided that a defendant could not be held to bail in an action on a policy of insurance where there had been no adjustment; implying that he might have been held to bail if there had been an adjustment. And in *Collins v. Wallis*, 11 J. B. Moore, 248, a defendant was held to bail where the damages had not been ascertained so clearly as here, where the underwriter has, under his hand, expressly admitted that the assured has sustained damage to a certain amount. Whether debt can be brought for the cause of action is not the criterion whether it can be set off. *Morley v. Inglis*, 4 Bing. N. C. 58. The criterion is, whether the amount is rendered certain without the intervention of a jury. In fact, adjustment, according to custom, is part of the contract. He also cited *Thomson v. Redman*, 11 Mee. & W. 487; *Crawford v. Stirling*, 4 Esp. 207; and Selw. N. P. 983.

Pollock, in reply. The amount of loss is not ascertained by the adjustment. Ordinarily a man can only relieve himself from a contract by showing that he entered into it under a mistake of fact; but in the case of an adjustment the underwriter is not concluded by it if there has been any misconception of the law. *Christian v. Coombe*, 2 Esp. 489. An adjustment indorsed on a policy, and signed by the underwriter, is like a promissory note; *prima facie* it is binding, and imports a good consideration, but the party sued is at liberty to show the circumstances under which it was given, to escape from his liability.

JERVIS, C. J. I am of opinion that the plea is bad, and that our judgment must be for the plaintiff. The action is brought on a policy of insurance, by which the plaintiff seeks indemnity for a partial loss. The defendant pleads that the proportional sum which he was liable to pay was adjusted at a certain rate, and ascertained to be a certain sum, and against that he sets off money due to him from the plaintiff for premiums on policies of insurance. It is admitted that the adjustment of itself does not alter the character of the plaintiff's remedy, and that notwithstanding the adjustment an action may still be brought upon the policy to recover unliquidated damages; and that

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if the action had been so brought without more appearing upon the record to fix the amount of damages, then the claim would not have been one to which the defendant could have pleaded a set-off. It is admitted, therefore, that to an action on a policy for unliquidated damages there can be no set-off, and that an adjustment by agreement is by itself no answer to an action on the policy, and does not put the plaintiff to his remedy upon an account stated. But it is said that the rule originally applicable to set-off is now more relaxed, and that in any case where a debt certain is the subject of the action, the modern practice is to allow a set-off, and that in the present case the plea makes the amount sued for certain; and, therefore, that against a debt so made certain by the plea, the defendant is at liberty to avail himself of his set-off. The question therefore is, what is the effect of the adjustment? Possibly, if the adjustment were an absolute binding arrangement, from which the parties could in no way depart, and the defendant, although the action were in form for unliquidated damages, might on the whole record show that the plaintiff's claim was for a sum certain, in that case possibly the defendant might be entitled to his set-off. But on that it is not necessary to express an opinion, for the view which I take is, that an adjustment has not the effect of determining absolutely the amount due, so as to dispense with the intervention of a jury, but that it is an instrument, or means, by which a jury may be led to the conclusion that the amount adjusted is the real amount of unliquidated damages, for which they are to give their verdict. It is only a means for enabling the jury to fix the amount for which the plaintiff sues in the shape of unliquidated damages, and not an amount binding upon the parties in all events. In this view it is unnecessary to determine what would be the effect of the plea, if the adjustment were absolutely binding. The action is for unliquidated damages, and although in effect it may be for a given sum, still the adjustment does not alter the nature of the plaintiff's remedy. This case is entirely without authority, for the cases cited in truth do not touch the point. In *Wienholt v. Roberts*, the question might have been raised, but it was not, as Sir W. Garrow only took the objection that there was no mutuality, and that objection being disposed of, the set-off was allowed. So in *Cumming v. Forester* the point under discussion was not determined, nor in *Lear v. Heath*; and although in the latter case it was decided that a defendant could not be held to bail in an action on a policy of insurance, where there had been no adjustment, it was not determined that he could have been held to bail if there had been an adjustment. The case of *Adams v. Saunders*, more fully reported in 4 Car. & P. 25, is the only one bearing on the subject. In that case, Lord Tenterden refused to allow the plaintiff to show that in the adjustment too small a sum had been allowed, because he thought the adjustment as to that concluded the parties, and ought not to be opened unless the plaintiff could show some ignorance on his part of either the law or the facts of the case. On the whole, I think, that this action being brought for unliquidated damages, and the adjustment being merely evidence which the parties have agreed should be laid

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before the jury of the amount due as damages, it does not enable us to say, that the action is brought for liquidated damages, any more than in an action on an attorney's bill, which has been taxed before action brought, is the taxation conclusive as to the amount due; the taxation only enables the jury more safely to determine the amount.

CRESSWELL, J. I am entirely of the same opinion; and after the review by the Lord Chief Justice of the cases, I shall add but little on this matter. One would imagine at the outset that this was a question of considerable importance to the mercantile world; but when we find that for a long series of years it has been the subject of discussion, without having been once raised upon the record, I trust it is but a small matter after all. The declaration is undoubtedly for unliquidated damages; and then the parties have agreed that a certain sum shall be taken as the amount of damages. Although this may render it difficult for either of them to say before a jury, that a larger or a smaller sum is the proper amount of damages; yet that sum has only been ascertained as evidence for the jury. Suppose the plea had gone further, and said the plaintiff had agreed to take a certain sum in satisfaction of his claim, that would not have deprived him of his action on the policy, and would have been no answer to his claim.

TALFOURD, J. The fallacy of the argument for the defendant is, that he treats what is merely evidence of a fact which the jury have to find, as conclusive upon the parties. Practically that may or may not be so; but the adjustment may not be the only evidence before the jury; other circumstances may be introduced to their notice to influence their decision.

Judgment for the plaintiff.

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June 3, 1853.

Detinue — Joint Tenants of a Chattel — Delivery of by all, Demand of by one — Pleading — Evidence.

Detinue for documents of the plaintiff. Plea, that they were delivered to the defendant by persons jointly interested in them with the plaintiff; that the said persons never demanded them back; and that the defendant held with their consent. The evidence was, that the plaintiff was a shareholder and purser in the B. Mining Company, and that he had delivered the documents to the defendant, an accountant, in pursuance of a resolution of the shareholders, in order that the defendant might report on the state of the company's affairs, and that the plaintiff in his own name, and not on behalf of the other shareholders, had demanded them back: —

Held, that the plea raised a good defence, and was proved.

¹ 22 Law J. Rep. (N. S.) C. P. 225; 17 Jur. 603; 1 Common Law Rep. 738.

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THE declaration stated that the defendant detained from the plaintiff certain books, papers, and documents of the plaintiff, that is to say, a purser's cost book, a merchant's ledger, an invoice ledger, divers merchant's accounts, vouchers for payment to merchants, a banker's book, accounts of debts, lists of shareholders in the Bwlch Consolidated Mining Company, copies of resolutions of the meetings of the company or of the directors, and other books, papers, and documents relating to the affairs of the company; and the plaintiff claimed a return of the said books, papers, and documents, or their value, and 500*l.* for their detention.

The defendant pleaded, first, *non detinet*; secondly, that the books, papers, and documents were not the plaintiff's; thirdly, that the books, &c., were delivered to the defendant for the purpose of his employing himself upon them as an accountant, and that he had a special lien upon them by the custom of accountants, for the amount of his charges, for his work done; fourthly, that the books, &c., were delivered to the defendant by certain persons entitled jointly with the plaintiff to the property therein, for a special purpose, to wit, that he should employ himself thereon as an accountant, and that the special purpose was not yet fulfilled; fifthly, that the books, &c., were delivered to the defendant by certain persons entitled to the property in and possession of the same jointly with the plaintiff, and that the said persons have never required or demanded of the defendant that he should re-deliver the same to them or to any other person, and that the defendant always held and now holds the said books, &c., by and with the consent and license of the persons so jointly interested with the plaintiff as aforesaid.

The case was tried, before Jervis, C. J., at the sittings for London, after last Easter term, when it appeared that the plaintiff was the purser and shareholder in the Bwlch Mining Company, unincorporated, and that his duties, as purser, were, to keep the mining accounts, to sell ores and receive the price, to draw and accept bills on behalf of the company, and to pay the tradesmen's bills, the receipts or vouchers for which he usually kept until he had passed his own accounts. The affairs of the company having got into disorder, at a meeting of the shareholders, on the 27th of June, 1851, it was resolved, that the defendant, who was an accountant, should be requested to examine the accounts, and to prepare a balance sheet, and that all books and necessary documents should be forthwith transmitted to him by the plaintiff and two other officers of the company. The plaintiff, in pursuance of this resolution, soon after sent to the defendant all the company's books in his possession, with accounts of the debts paid and owing, and also the receipts and vouchers for the payments which he had made. The defendant not having made any report, the plaintiff, in December, 1852, served the defendant with a notice of demand as follows:—"Take notice, that I, the undersigned, John Jones Atwood, purser, and one of the partners or shareholders in the Bwlch Consolidated Mining Company, do hereby demand and require that you, Mr. Henry Evans, deliver up to Mr. John Daniel Clarke, who is the bearer hereof, the following books, papers, and

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documents, relating to the said Bwlch Consolidated Mining Company, that is to say, the purser's cost book, merchant's ledger, invoice, merchant's accounts, vouchers for payments to merchant, banker's book, accounts of debts paid and owing, lists of shareholders, copies of resolutions of meetings, and all other books, books of account, documents, letters, papers, and writings whatsoever in your possession or within your control, in anywise relating to the affairs of the said company."

The defendant having refused to comply with this demand, the present action was brought.

The defendant failed to establish the lien set up by the third plea but contended, on the other issues, that the action ought to have been brought by all the shareholders, or at least by the plaintiff, jointly with the other two officers mentioned in the resolution. The Lord Chief Justice directed the verdict to be entered for the plaintiff on all the issues, with 500*l.* damages, to be reduced to 1*s.* upon delivery to the plaintiff of the documents sought to be recovered in the action, and leave was reserved to the defendant to move to enter a nonsuit or a verdict for him on the first, second, fourth, and fifth issues, on such one of them as the court should direct.

Willes having obtained a rule *nisi* accordingly,

Aspland now showed cause. There is no serious contest on the first or second issue, for it is clear there was a detention in fact, which is sufficient to entitle the plaintiff to the verdict on them. *Mason v. Farnell*, 12 Mee. & W. 674. And even if the defendant contended that *non detinet* has the same effect as not guilty in trover, and puts in issue a wrongful detention. *Mayhew v. Herrick*, 7 Com. B. Rep. 229; a wrongful detention was proved, namely, a detention under an unfounded claim of lien. But the question cannot arise. *Broadbent v. Ledward*, 11 Ad. & E. 209, is expressly in point. There the action was brought to recover pictures belonging to a club, of which the plaintiff was a trustee and member, and two pleas identical with the first and second pleas here were pleaded, and the plaintiff had a verdict. The court decided that the action was well brought, and it was no objection that the other members of the club were not joined. The real question arises under the fourth or fifth plea. The fourth plea is bad; and if bad, the defendant, to entitle him to a verdict on it, was bound to prove it all. It alleges a delivery by certain persons entitled jointly with the plaintiff, not a joint delivery by the plaintiff and those persons. If one joint tenant has no right to deliver without the leave of the others, the plea is bad. If he has, the plea is no answer, because if one has a right to deliver, one has also a right to demand back; and if one has that right all have, and therefore the plaintiff has; and *Lilley v. Barnsley*, 1 Car. & K. 344, shows that it is no answer to say that the particular purpose for which the chattel was delivered has not been fulfilled. But if the plea is good, it was not proved, for the delivery was by the plaintiff and others jointly, and not by the others alone. The same remarks apply to the fifth

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plea. It alleges a delivery by certain persons entitled jointly with the plaintiff, without stating with the plaintiff's concurrence, and that they have never demanded possession, and that the defendant holds by their consent. It admits a detention, and it was not necessary for the plaintiff to prove a demand either on his own behalf or on behalf of all. For the chattel might be destroyed, or an intention stated by the defendant not to deliver, and no demand in such case would be necessary.

[MAULE, J. The defendant says, "True I did detain your books, and they were delivered to me by certain persons jointly entitled to them with you — whether you concurred in that delivery is immaterial, and therefore I do not state whether you did or not — and they acquiesced in my detaining them." If the plea had said the defendant detained them by the "command and authority," instead of by the "consent and license," of the plaintiff's co-tenants, in the upshot this would have been the case of one co-tenant maintaining detinue against another.

Willes, contra. I shall contend that a license acted upon amounts to an authority. If one co-tenant authorizes a man to go over his land, another co-tenant cannot maintain trespass if the man goes.

But, further, the plaintiff as purser of the mine had a special property in some of the documents, the vouchers, which were the only proof of the money he had paid, and he was entitled to the sole custody of them for the purpose of passing his accounts.

Willes, contra. The fourth and fifth pleas are good. One joint tenant may authorize a stranger to deal with the joint chattel in any manner in which he might deal with it himself. A license is something more than a mere non-interference; it is an authority given by one person to another who does not stand in the relation of servant to him.

[MAULE, J. It may be an authority available at the option of the licensee.]

Yes. In *Donaldson v. Williams*, 1 Cr. & M. 345, if the servant allowed by one joint tenant to remain in the house had dealt with third persons, the contracts made by him would have been binding on those whose business was carried on at the house.

[MAULE, J. Suppose A says to B, "what shall I give you to let me shoot those ducks?" B, the ducks not belonging to him, says, "half-a-crown." A gives it to him and shoots the ducks. Is B liable for A's trespass to the owner of the ducks? If he is, it might show that a license executed becomes a command. Or does the license amount to more than this, "You may do it if you like, but I will not be responsible?"]

B, by taking the half-crown, assumes to be the owner of the ducks and to have authority, and according to *Newman v. Zachary*, Allon's Rep. 3, he would be liable. There it was held that an action would lie against a man for saying that a sheep was not the property of the

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plaintiff, but an estray, whereby the bailiff of a manor seized it as an estray.

[JERVIS, C. J. Suppose one of two joint tenants authorizes a man to go over his land, but before the man goes the other joint tenant forbids him to go; is not that a revocation of the original license?]

No. If it is, it ought to come by way of replication. In this case the authority to the defendant was to hold till the work was done. The notice and demand sent by the plaintiff was not sent on behalf of the others, and there is no evidence that the others intended to revoke their authority. The pleas are, therefore, proved. The defendant might have pleaded the non-joinder of the other joint tenants in abatement; but his not having done so is no objection to his pleading that the others authorized him to detain.

[MAULE, J. If he had pleaded in abatement there would have been no replication, but the plaintiff would have taken issue on the plea, and it would have been disproved by showing that others besides those named in it were jointly interested. But you say that the allegation here that some delivered would not be disproved by showing a delivery by them and another, the plaintiff.]

One joint tenant may license a dealing with the chattel, but all must join in an action for an injury to it; just as all joint covenantors must sue on the covenant, but one alone may release. So also a plea of accord and satisfaction with one of several plaintiffs suing on a joint demand for goods sold and delivered is good. *Wallace v. Kelsall*, 7 Mee. & W. 264. As regards the vouchers, the evidence does not prove that the plaintiff had a separate property in them.

MAULE, J. It appears to me that this rule to enter a verdict for the defendant on the fifth plea must be made absolute, as I am of opinion that it was a good plea, and was substantially proved. It sets up by way of defence to this action, that the papers and documents sought to be recovered were delivered to the defendant by certain persons jointly entitled to them with the plaintiff. It does not deny nor affirm that the plaintiff delivered, but says that the others delivered, and that the defendant holds by the consent of those others; and it was necessary for the defendant to prove that those others did deliver, and that he continues to hold by their license and consent. Where several owners in common of a chattel concur in a delivery of it to a third person, the latter may retain it until they ask him to return it. If some of them ask him to give it back, and others desire him to retain it, under those circumstances, I think no action of detinue is maintainable against him at the suit of those who ask him to have it back. If one could on his own account ask to have it returned to him, and maintain an action if it was refused, another might do the same; and so the bailee of the chattel might be harassed by as many actions as there might be joint owners of the chattel. It seems to me, therefore, clear enough, that if two concur in delivering a chattel of which they are joint owners, that one alone cannot, without the consent of the other, demand it back, and bring an action for its detention. Now, that is the defence which in sub-

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stance is set up by this fifth plea. It says that the papers were delivered to him, the defendant, by the plaintiff's partners, not denying that the plaintiff delivered; that the defendant held, and continues to hold them, by their license and consent. The defendant was not bound to detain them, but if he does, I think he is not liable to an action for the detention. For these reasons, I think the defendant has set up a good defence and proved it. It has been sought to make a distinction between some of the documents and others, and it has been said that the plaintiff held some of them by a right distinct from his joint ownership, namely, in his character of purser of the mining company, and that he had occasion and a right to keep them to the exclusion of the other members till he had passed his accounts. I do not mean to say that there might not be an agreement giving him that right, nor that several joint owners might not agree that one of them should have the exclusive custody of their chattel. But no resolution to the company to that effect, nor any thing of the kind, has been given in evidence here. The plaintiff, who was called, does not himself say that there was such a resolution. All that was relied on at the trial and urged now is, that the plaintiff being purser, and having on former occasions used such documents as vouchers for the purpose of passing his accounts, because he had not, on the present occasion, passed his accounts, it is to be assumed that he was entitled to the exclusive custody of them on this occasion also for that purpose. But I think that is by no means enough to take them out of the joint ownership. They might be, and no doubt had been, used as vouchers for the plaintiff, but the main object in taking them was to defend the company, in order that if they were sued by tradesmen whose accounts they had paid, they might have the receipts to produce as an answer to their claims. That being all the evidence, I think that the special right or lien, or whatever it is to be called, relied upon by the plaintiff, was not proved. The facts resolve themselves into the simple case of several owners handing over their joint property to a third party, and not agreeing in subsequently demanding it back. One only, the plaintiff, desiring the defendant to return it to him, the plaintiff's exclusive custody, and the rest not concurring in that, but allowing the defendant to hold it. For these reasons, I think the defence relied upon in the plea is sufficient, and that it was proved.

CRESSWELL, J. I am of the same opinion, and think that we are bound by the agreement between the parties at the trial to make this rule absolute. It appears that the documents in question were placed in the defendant's custody by the concurring will of all parties interested in them, and that the authority so conferred upon him was never, as far as several of them were concerned, withdrawn. It cannot be contended upon the evidence that there was any express authority conferred upon the plaintiff to demand the documents back on behalf of the rest, and if he had no such authority the original license was never withdrawn, but continued unimpaired, and the defendant has a good defence. It has been attempted to make a

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distinction between some of the documents; but I am not satisfied upon the evidence that any such distinction can be made, and the understanding at the trial was that the verdict was to be entered for the defendant if the fifth plea was proved. Now, it was proved that an authority was conferred upon the defendant by all, and it was not proved that that authority was withdrawn. It was not proved, but I think there was some evidence,—and in that I differ from my brother Maule, who thinks there was none,—from which the jury might have inferred that the plaintiff, in his character of purser of the company, was entitled to the sole custody of the vouchers; but we cannot give the plaintiff the benefit of that now.

JERVIS, C. J., and TALFOURD, J., concurred.

Rule absolute to enter the verdict for the defendant on the fifth plea¹

SHEEHY v. THE PROFESSIONAL LIFE ASSURANCE COMPANY.²

June 7, 1853.

Pleading — Plea of Judgment obtained without Knowledge of Process.

To an action on an Irish judgment, the defendants, who were a corporation, pleaded that they were not served with process in the action, and that "the plaintiff irregularly, behind the back of the defendants, caused an appearance to be entered for the defendants," and thereby obtained judgment, when the defendants were not within the jurisdiction of the court, and had not been served with any process to appear in the action:—

Held, a bad plea, after the plaintiff had pleaded over to it, for not showing that the defendants did not know of the summons, or that they did not appear in the action.

Quære, if the 13 & 14 Vict. c. 18, s. 9, which provides for substitution of service in actions brought in Ireland, applies to corporations?

THE declaration was on a judgment recovered by the plaintiff

¹ The decision in this case necessarily results from the nature of the ownership of property held in common. For, if one tenant in common cannot maintain detinue against his co-tenant, for detaining the chattel, as has been frequently held, (*Bonner v. Latham*, 1 Iredell, 275, (1840); *Carlyle v. Patterson*, 3 Bibb. 93; *Lewis v. Night*, 3 Littel, 223,) neither can he against one who holds under leave and license from such other co-tenant. Neither can one tenant in common maintain trover against his co-tenant, (*Webb v. Danforth*, 1 Day, 301; *Hyde v. Stone*, 9 Cowen, 230;

Farr v. Smith, 9 Wendell, 338; *Gibson v. Vaughan*, 2 Bailey, 389; *Chinn v. Respass*, 1 T. B. Monroe, 25; *Ellis v. Culver*, 2 Harrington, 129,) unless there has been an entire destruction, or sale of the article, by one co-tenant, in which event some cases hold the other co-tenant may sue in trover, recovering as damages his share of the value of the property. *Weld v. Oliver*, 21 Pickering, 559; *Rains v. McNarry*, 4 Humphreys, 356; *Herrin v. Eaton*, 13 Maine, 193; *Hurd v. Darling*, 14 Vermont, 214; *Hyde v. Stone*, 7 Wend. 354.

² 22 Law J. Rep. (N. S.) C. P. 244; 17 Jur. 651; 1 Common Law Rep. 583.

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against the defendants, sued as a corporation, in the Court of Queen's Bench, in Ireland, on the 16th February, 1852.

Plea — that the defendants were not, at any time, served with any summons or process issuing out of the said Court of Queen's Bench in Ireland, at the suit of the plaintiff, in the action upon which the said judgment was obtained, and that the plaintiff, irregularly and behind the backs of the defendants, caused an appearance to be entered for the defendants in the said action, and thereby obtained the said judgment therein, when the defendants were not within the jurisdiction of the said court, and had not been served with any summons or other process to appear to the said actions, in which the said judgment was so obtained as aforesaid.

Replication, that the said action in which the said judgment and decree were respectively obtained, was commenced in the said court, the said court being one of the superior courts of common law in Ireland, after the making and carrying into force of a certain act of parliament passed in the 13th year of our lady the now queen, intituled, "An act for the regulation of process and practice in the superior courts of common law in Ireland," and the said action was duly commenced by writ of summons, and in every respect according to the said statute, and that after the issuing of the said writ, and whilst it was in force, it was duly made to appear, by affidavit, to the satisfaction of the said court wherein the said judgment was obtained, that the defendants had not been personally served with the writ of summons issued in the said action, but that the defendants then resided out of the jurisdiction of the court, and could properly be served through or upon a certain agent or representative of the defendants within such jurisdiction; and thereupon the said court, to wit, on the 16th of January, 1852, did order that the writ of summons in the said action should be served by delivering the same, together with a true copy of the said order, unto and by leaving the same with one J. W. R., therein described as agent, in Dublin, of the defendants, and also by delivering true copies of the said order and the said writ in a letter in and through the general post-office, directed to the London agent of the defendants; and the plaintiff thereupon then in all things complied with the said order, and effected service of the said writ as thereby directed; and afterwards, on the day and year aforesaid, upon due proof of such substituted service as aforesaid, by affidavit, the plaintiff, in pursuance of such order, in default of appearance by such defendants, in due time, entered an appearance for the said defendants, under and by virtue of the said statute, and proceeded thereon in the said action as if the defendants had entered their appearance; and afterwards, on the 4th of February, 1852, the plaintiff filed his declaration in such action; and thereupon, afterwards, on the day and year in the declaration mentioned in that behalf, in default of plea, the said judgment was obtained as therein alleged. That afterwards an application was made, on behalf of the defendants, by attorney and counsel, in the said court, and the said court was then, on behalf of the defendants, moved to set aside the said appearance and declaration filed in the

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said action and all subsequent proceedings thereon; and on hearing the said motion and counsel on behalf of the plaintiff and defendants, it was ordered by the said court that the said motion should be, and the same was then refused.

Rejoinder, that the defendants are and were at the time of the commencement of the said action in the said court in Ireland a corporation aggregate, within the true intent and meaning of the said statute in the replication mentioned; and that they had not, before or at the time of the commencement of the said action, any clerk, treasurer, or secretary within the jurisdiction of the said court, nor any known and responsible officer or agent, or any agent, representative, or manager of their real or personal estate within the jurisdiction of the said court; and that the plaintiff caused and procured the said orders to be made by falsely representing to the said court that the said J. W. R. was the agent of the defendants within the meaning of the said statute, whereas in truth and in fact he was not such agent.

Surrejoinder, that the said company, the defendants, had, at the time of the commencement of the said action in the said Court of Queen's Bench in Ireland, an agent within the jurisdiction of the said court; and that the plaintiff did not procure the said order of the said Court of Queen's Bench in Ireland in the replication and rejoinder mentioned to be made by falsely representing that the said J. W. R. was the agent of the defendants within the meaning of the said statute, because the plaintiff saith that at the time of the suing out and serving of the said writ of summons in the said action, as in the replication mentioned, the said J. W. R. was an agent of the defendants within the jurisdiction of the said court, that is to say, in the city of Dublin. That the affidavit by which it was made to appear to the satisfaction of the said court that the defendants could be properly served with the said writ, through or upon an agent of the defendants, within the jurisdiction of the said court, was an affidavit of one B. E., duly made and sworn in the said court in the said action, and duly filed in the said court on the 15th of January, 1852, in which the said writ was set forth and recited, and it was sworn and represented to the court that the said B. E. had, on the day and year aforesaid, served the Professional Life Assurance Company, of London, (meaning the defendants, being such incorporated company, as in the rejoinder mentioned,) with the original writ of summons in the said action, by delivering unto and leaving with the said J. W. R., the agent for the said company in the city of Dublin, in person, at his office, at, &c., a true copy of the said original writ, and that he, the said B. E., had desired him to send the said copy so served to the office of the said company in London, and that he, the said B. E., at the same time, showed him, the said J. W. R., the said original writ of summons, and told him the true intent and meaning thereof. That the said affidavit being so sworn and filed in the said court, was afterwards, on the 16th of January, 1852, read to the said court by counsel, on behalf of the plaintiff in the action, and that the court, on hearing such affidavit read, did make such order as in the replication in that behalf alleged, and which said order was in the

terms following, that is to say, "On motion of Mr. S., of counsel for the plaintiff, and on hearing affidavit of B. E. read, it was ordered, that the service of the writ of summons on the defendants in this cause, by delivering a true copy thereof, together with a true copy of this order, unto and by leaving the same with J. W. R., the Dublin agent, and also by inclosing similar copies in a letter through the general post-office, directed to London, be deemed good service of the said writ upon the said company." That the said J. W. R., in the said order mentioned; was and is the said J. W. R. in the replication and rejoinder respectively referred to, and hereinbefore in the said affidavit also referred to. That the plaintiff so otherwise caused or procured the said order to be made therein as aforesaid, and that he made or caused to be made no false representation to the said court, as in the rejoinder alleged, nor, save as aforesaid, any representation whatever in that behalf; and further, that the contents of the said affidavit in that behalf were in fact true.

Issue joined and demurrer.

The defendants' grounds of demurrer were, that the surrejoinder neither traverses nor confesses and avoids the rejoinder; that the defendants, being a corporation aggregate, the writ of summons could not properly be served on an agent, the 8th section of the statute requiring the service to be on the mayor or other head officer, town clerk, treasurer, or secretary; or, at least, it should have been alleged that the agent was a known and responsible agent of the defendants, or an agent of their real and personal estate, or an agent within the true intent and meaning of the statute.

The plaintiff stated in his points, that the rejoinder was bad in substance, because the only fact which the defendants could properly allege, in answer to the replication, was, that the affidavit by which the court in Ireland were satisfied that they could make the substituted service was false.

Byles, Sergt., (*Hoggins* was with him,) in support of the demurrer. The surrejoinder is bad. The second plea shows that the defendants were not served with any summons in this action, and that the plaintiff irregularly caused an appearance to be entered for them while they were out of the jurisdiction. If any question should be raised as to the language of the plea, the words "behind the backs of the defendants" must be taken to mean "without their knowledge."

[*CRESSWELL*, J. I cannot give any legal meaning to the words "behind the backs of the defendants."

MAULE, J. I give the words their ordinary literal meaning; but we cannot take notice that a judgment irregularly obtained will not be good. It may be good enough if no steps be taken to set it aside.]

There does not appear to be any rule of law preventing the use of figures of speech in pleading; and the plaintiff having pleaded over to the plea, its language must be so construed as to support it.

[*JERVIS*, C. J. How can the court discover that the words are used metaphorically?]

By looking at the context.

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[CRESSWELL, J. What is the meaning of "behind the back of a corporation aggregate?" The pleading over in the replication consists in stating that notice was given to an agent. Does that admit that the corporation knew nothing about the action?]

The 13 & 14 Vict. c. 18, is the statute by which the courts in Ireland have jurisdiction in proceedings against English corporations. That statute provides, by its 8th section, that the mode of service of process upon a corporation shall be by service on the head officer, clerk, &c., or some known and responsible agent. The 9th section provides, "that in case it shall be made to appear, by affidavit, to the satisfaction of the court in which the appearance to the process should be made, or in vacation, of any judge of either of the said courts, that any defendant has not been personally served with any writ of summons, and has not, according to the exigency thereof, appeared to the action, and that due and proper means were used to serve such writ, or that such defendant resides out of the jurisdiction of the court, and can be properly served through or upon any agent, or representative, or any manager, of the real or personal estate of such defendant within such jurisdiction, or has removed to avoid service, or on any other good and sufficient grounds, it shall be lawful for such court or judge to authorize such substitution of service through the post-office, or in such manner, and with such extension of time for service and appearance, as to them or him shall seem fit; and upon due proof of such substituted service by affidavit, it shall and may be lawful for the plaintiff, in default of appearance by such defendant in due time, to enter an appearance for such defendant, and to proceed thereon, as if such defendant had entered his, her, or their appearance." Now, it does not appear in the present case that there has been any service upon an officer or a known or responsible agent of the corporation.

[JERVIS, C. J. To whom and to how many persons must he be known, and to whom must he be responsible?

MAULE, J. It may be that the company appoint him agent, with a proviso that he shall not be responsible.]

The agent must be responsible to the company and generally known. The real question is, whether the proceedings were within the knowledge of the company; and it is submitted that this does not appear. It seems very doubtful whether the 9th section of the statute, as to substitution of service, can apply to corporations at all.

Willes, (*Finlason* was with him,) *contra*. The statute of the 13 & 14 Vict. c. 18, was passed with reference to the established practice; and it was surely never intended that it should take away the jurisdiction possessed by the Irish courts, for the substitution of service, ever since the 43 Geo. 3, c. 53, s. 8. It has been customary for many years for English insurance companies to have agents in Ireland on whom substituted service has been effected. In the case of *Moloney v. Tulloch*, 1 Jones's Exch. Rep. (Irish) 114, Baron Pennefather treated such service as proper and well established. In a subsequent case of *Phelan v. Johnson*, 7 Irish Law Rep. 527, where it was held that

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he Irish courts had power to order substitution of service of process against a defendant out of their jurisdiction, the Chief Baron, Brady, in an elaborate judgment, alluding to the provisions of 43 Geo. 3, c. 53, pointed out that that statute conferred powers upon the courts in Ireland which the English courts had never possessed. Then, it is said, that the 8th section of the 13 & 14 Vict. c. 18, is the only one which applies to corporations, and that the 9th section is not applicable. But the interpretation clause of the act (section 51,) provides that the words "party or person" shall extend to and include any corporation or other public body.

[CRESSWELL, J. But it does not say the word "defendant" shall include a corporation.]

[MAULE, J. Is there any subsequent section to interpret the interpretation clause? One would expect an interpretation clause, the subject of which is words, that the words intended to be interpreted would be introduced, not other words.]

It is submitted that the defendants were sufficiently served. But the plea is clearly bad. The allegation that the judgment was recovered against the defendants irregularly and behind their backs, contains only a statement of evidence tending to show that the defendants had no knowledge, and does not conclusively show that. But there may be a good judgment without knowledge on the part of the defendant, as in the case of a warrant of attorney. *King v. Simmons*, 7 Q. B. Rep. 289. In *Reynolds v. Fenton*, 3 Com. B. Rep. 187, to a declaration on a Belgian judgment, there was a plea that the defendant was not served with process and had no notice; and it was held bad, on the ground that it did not show that the defendant was deprived of the opportunity of defending himself. If the defendants did not choose to take notice of the summons, that did not prevent the plaintiff from entering an appearance for them, and there is no security for giving notice of such entry.

Byles, Sergt., in reply. In *Reynolds v. Fenton*, Maule, J., drew the distinction between the Belgian case and the Irish case of *Ferguson v. Mahon*, 11 Ad. & E. 179, that the English courts would take judicial notice of the imperial acts which show the law of Ireland to be the same as that of England with respect to the mode of commencing an action. But the 8th section of the 43 Geo. 3, c. 53, and the 9th section of the 13 & 14 Vict. c. 18, should be construed strictly; and it is clear that they apply not to corporations, but to natural persons, who alone can be "personally served."

[MAULE, J. Some parts of the 9th section of the 13 & 14 Vict. c. 18, must apply to the natural person; but then the words "on any other good and sufficient grounds" might apply to a corporation. I think that personal service in that section must comprehend what was equivalent to personal service under the former act; and, therefore, must include service upon the agent of a corporation. It is consistent with the plea, that the writ came to the knowledge of the defendants, and that they appeared. It frequently happens, that where a party appears for a defendant, the defendant comes and sets that appearance aside, on the ground that he has appeared himself.]

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JERVIS, C. J. I think the plea is bad; and it is unnecessary to discuss the other points which have arisen in the case. It appears to me, that the plea only shows that the defendants were not in Ireland at the time the appearance was entered and the judgment signed. It is quite consistent with this plea that the defendants may have known that the summons had issued. It is quite consistent with their knowledge of that, that the defendants entered an appearance behind their backs.

MAULE, J. I think the plea is clearly bad, because I do not see how, any way, we can infer from it the non-appearance of the defendant. For all that it avers, the judgment may have been obtained on an appearance entered by the defendants themselves.

CRESSWELL, J., and TALFOURD, J., concurred.

Judgment for the plaintiff.

SHEEHY v. THE PROFESSIONAL LIFE ASSURANCE COMPANY.¹

June 13, 1853.

Practice — Pleading and Demurring — Common Law Procedure Act, 1852.

Where a party has obtained a judge's order for leave to traverse and demur to a pleading under the 80th section of the Common Law Procedure Act, 1852, and judgment has been given against him on the demurrer, the court will not rescind the order as to the traverse and strike it out.

THE plaintiff, after judgment was given in his favor upon a demurrer to the surrejoinder (*vide ante*, p. 268,) obtained a rule *nisi*, for rescinding an order made by Maule, J., under the 80th section of the Common Law Procedure Act, 1852, (13 & 14 Vict. c. 75,) giving the defendants leave both to traverse and demur to the surrejoinder, and directing that the demurrer should be first disposed of, and for striking out a traverse of the surrejoinder pleaded by the defendant, by taking issue on it.

Byles, Sergt., (June 13,) showed cause. In the first place, the court has not the power to strike out the rebutter; and in the second place, if it had such power it would not exercise it, or, if it did, the statute would become a dead letter. The defendants have a right to the decision of a court of error upon the record as it stands.

Finlason, in support of the rule. The court has power to rescind

¹ 22 Law J. Rep. (N. S.) C. P. 249; 17 Jur. 683.

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rule of Maule, J. It is a matter left to the discretion of the court the statute, which enables a judge to give a party the power to ad and demur, which he did not possess at common law. Formerly, it was at the option of the plaintiff, as a general rule to try the questions of law or of fact first. See *Crucknell v. Trueman*, 9 Mee. W. 684.

[CRESSWELL, J. Suppose the plea and the subsequent pleadings be good, but the surrejoinder to be false in fact, would not the defendants be entitled to judgment? Is not the effect of the new statute to admit a party, on application to a judge, to demur, without being obliged to admit the facts — to relieve parties from the difficulty which they were placed by demurring only?]

This court must proceed on the assumption that its own judgment is correct, and that the plea is bad.

JERVIS, C. J. I am of opinion that the rule must be discharged. If we could be absolutely certain that the plea is bad, we could do no harm by ordering the traverse of the surrejoinder to be struck out. But we have no right to deprive the defendants of their writ of error. It may turn out that the plea is very good, and that the surrejoinder is good, but not true.

MAULE, J. It is impossible to rescind the judge's order upon which the demurrer was founded and argued, and by which issue was joined both in fact and in law.

CRESSWELL, J., and TALFOURD, J., concurred.

Rule discharged.

DARLEY & others v. MARTIN & others.¹

June 11, 1853.

Will — Codicil — Construction — Devise of Leaseholds — Estate for Life — Executory Bequest over — "Default of Issue" — "Leaving Issue."

A, by his will, bequeathed leaseholds to his daughter M. for her life, and after her decease to her lawful issue, and "in default of such issue," to his son G. and his issue. A codicil, made by the testator, recited that he had bequeathed the leaseholds to G. after the death of M., and "in default of her leaving lawful issue : " —

Held, that the will might be interpreted by the codicil, and that the gift over in the will, "in default of issue," being therefore capable of importing a bequest over on failure of issue living at M.'s death, it ought to be taken in that sense; and that even if the limitation in the will gave an absolute interest to M., there was a good executory bequest over to G. and his issue.

¹ 22 Law J. Rep. (N. S.) C. P. 249 ; 17 Jur. 1125 ; 1 Common Law Rep. 729.

Darley v. Martin.

EJECTMENT. By an order of Cresswell, J., dated the 15th of April, 1853, a special case was stated, which contained the following facts:

Case — This was an action of ejectment, commenced by writ issued on the 12th of April. A. D. 1853, in which the plaintiffs some or one of them, claimed to be entitled to a leasehold messuage and premises, known as No. 48 Dorset Street, in the parish of St. Marylebone, in the county of Middlesex, and to other leasehold messuage and premises known as No. 42 Beaumont Street, in the same parish and county. The defendants appeared and defended for the whole of the premises. Before and at the time of the making of his will hereinafter mentioned, and from thence until and at the time of his death, George Darley was possessed of certain personal property, and amongst it certain leasehold messuages, with the appurtenances, held by him for certain long terms of years, that is to say, two leasehold messuages, with the appurtenances, known as Nos. 7 and 8 Holley Place, Hampstead, No. 38 Duke Street, Manchester Square, No. 2 Charles Street, Manchester Square, and No. 48 Dorset Street and No. 42 Beaumont Street, for which the ejectment is brought. On the 12th of June A. D. 1820, the said G. Darley made his will, which, so far as it relates to the question in this case was in the words and figures following, that is to say, "I give and bequeathe to my son, George Darley, all those my leasehold messuages, with the appurtenances, being Nos. 7 and 8 Holley Place, Hampstead, in the county aforesaid, for the term of his natural life, and from and after his decease, I give the same to and amongst his children living at the decease of my said son George, share and share alike, and if but one, the whole to such only child; and in respect to the messuage No. 8, with the appurtenances, I direct that he shall not assign, transfer, or incumber the same in any way whatsoever, on pain of forfeiting his interest therein, to fall into the residue of my estate. I give and bequeathe unto my beloved daughter, Mary Darley, her executors, administrators, and assigns, all that my leasehold messuage, with the appurtenances, being No. 38 Duke Street, Manchester Square, aforesaid; I also give and bequeathe unto my said daughter, M. Darley, her executors, &c., all that my leasehold messuage, with the appurtenances, being No. 2 Charles Street, aforesaid; I also give and bequeathe unto my daughter, M. Darley, all that my leasehold messuage, with the appurtenances, being No. 48 Dorset Street, near Manchester Square, aforesaid, for the term of her natural life; and from and after her decease, I give and bequeathe the same last-mentioned premises unto and amongst the lawful issue of my said daughter, M. Darley, equally share and share alike, with benefit of survivorship, and in default of such issue, I give and bequeathe the same unto my son George, for his natural life, and after his decease to his children, equally, share and share alike, with the benefit of survivorship. I also give and bequeathe unto my said daughter, M. Darley, all that my leasehold messuage, with the appurtenances, being No. 42 Beaumont Street, Marylebone, for the term of her natural life, and from and after her decease, I give and bequeathe the same last-mentioned premises unto and amongst the lawful issue of my daughter, M. Darley, equally, share and share

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alike, with benefit of survivorship; and in default of such issue, I give the same unto my son, George Darley, for his natural life, and after his decease, to his children, equally, share and share alike, with benefit of survivorship."

By his will, the testator, after giving certain specific and pecuniary legacies to his son and daughter, and other persons, made his daughter, M. Darley, residuary legatee, and appointed her sole executrix of his will. On the 20th of September, 1820, he made a codicil to his will, which is in the words and figures following, that is to say, "Whereas in and by my within written will and testament, I, the said G. Darley, gave and bequeathed to my son, G. Darley, all those my messuages Nos. 7 and 8 Holley Place, Hampstead, for life, and after his decease, I gave the same to his children equally, if more than one, and if but one, then I gave the same to such only child, and I also gave and bequeathed to my said son George, after the decease of my daughter, M. Darley; and in default of her leaving lawful issue, all that my messuage No. 48 Dorset Street, near Manchester Square, and after the decease of my son George, I gave the same last-mentioned premises to his children, equally; I also gave and bequeathed to my said son George, in like manner, all that my messuage No. 42 Beaumont Street, St. Marylebone. And whereas I have made myself liable to the payment of 500*l.* under and by virtue of a certain note of hand or bill of exchange, given by me to Mr. Moore, for the use and accommodation of my son George, which will become due on the 30th of November next; now, in case my said son George should not pay the said last-mentioned sum of money, and indemnify my estate therefrom, but, on the contrary, my executrix should be called on and be obliged to pay the said note or bill by the default of my said son, who has promised to make provision for the same, it is my will, and I do hereby direct that in such case, all the aforesaid bequests contained in my said will, in favor of my said son George, (excepting wearing apparel) shall be revoked and of no effect, and I revoke the same accordingly; but it is my express will that such revocation shall extend to my son George only, and shall by no means tend to defeat or revoke the bequests therein made to his children in any manner whatsoever."

On the 4th of October A. D. 1820, the testator, George Darley, died, without having altered his will, except by the said codicil, and the said will and codicil were duly proved by the said M. Darley, the executrix, and she assented to the said several legacies and bequests contained in the said will, and among the rest to the said bequests of the said leasehold premises, with the appurtenances, the subject of this action of ejectment. The said testator, George Darley, had two children only who survived him, that is to say, the said G. Darley, the son, and M. Darley mentioned in his said will. G. Darley the son, married in his father's lifetime; the plaintiffs, G. Darley, M. I. F. Darley, P. J. Darley, and M. T. Darley, were the only issue of his marriage, who survived him; he had four other children, who died in early infancy. The last-mentioned plaintiffs were born in the lifetime of the said testator, and were well known to him. G. Darley the senior,

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died on the 22d of August A. D. 1845. M. Darley was not married in the lifetime of the testator, but after his death married John Ibbinson, and she died on the 14th of February A. D., 1853, without having any children.

The defendants are trustees of a settlement made on the marriage of J. Ibbinson and M. Darley, and they are in possession of the leasehold messuages, with the appurtenances, the subject of this action of ejectment. J. Ibbinson is alive. The question for the opinion of the court was, whether, under the said will and codicil, the said M. Darley took absolutely the whole interest in the said leasehold messuages No. 48 Dorset Street, and No. 42 Beaumont Street, or whether, after her death, without leaving children or issue, the same, or any, or what interest passed by the said will and codicil to the last-mentioned plaintiffs, as the only surviving children and issue of G. Darley the senior. If the said M. Darley took the whole interest in the said leasehold messuages, then judgment was to be entered for the defendants; but if on the death of the said M. Darley, without leaving children or issue, the plaintiffs took any interest in the said messuages under the said will and codicil, then judgment was to be entered for the plaintiffs, without costs, to recover possession of the said messuages, or such part or interest therein as the court might direct.

The case was argued (April 26) by —

Unthank, for the plaintiffs; and

Dowdeswell, for the defendant.¹

Cur. adv. vult.

JERVIS, C. J., now delivered the judgment of the court.² This case turns on the construction of the will and codicil of George Darley, made in the year 1820. The will, (after giving the testator's son George two houses in Hampstead for life, and after his death to and amongst his children living at his death,) bequeathes to his daughter Mary the leasehold houses in question for her life, and after her death to and amongst her lawful issue equally, share and share alike, with benefit of survivorship, and "in default of such issue" to the son for life, and after his death to his children. By a codicil, made shortly afterwards, the testator, after reciting that by his will he had given the two houses in Hampstead to his son for life, &c., and also that he had given to his son the houses in question "after the decease of my said daughter and in default of her leaving lawful issue," goes on to provide that, in case his son does not indemnify his estate from a certain debt of the son's for which he, (the testator,) had made himself liable, the bequest to the son shall be revoked.

On the part of the plaintiffs, it was admitted to be a settled rule that, if the bequest would have created an estate tail in real estate, it would confer the absolute interest in personal estate, such as the

¹ The argument, with the cases cited, are so fully gone into in the judgment, that it is not deemed necessary to report it here.

² JERVIS, C. J., CRESSWELL, J., and WILLIAMS, J., were present at the argument.

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households in question. But it was argued that the language employed in the will gave only an estate for life to the daughter: for that, first, according to Lord Thurlow's decision in *Knight v. Ellis*, 2 Bro. C. C. 570, a bequest of personal estate to A for life and after his death to his issue, gives the legatee an estate for life only; and secondly, that, at all events, a bequest like the present, of personal estate to A for life, and after his death to his issue as joint tenants or tenants in common, being a course of enjoyment inconsistent with the devolution of an estate tail, is only a gift to A for life; and thirdly, it was contended, on the authority of *Tilly v. Collyer*, 3 Keb. 589, and *Bibin v. Walker*, Amb. 671, that as the codicil recites that the testator had by his will given the houses in question to his son after the decease of his daughter and in default of her leaving issue, this was sufficient to constitute a bequest over in accordance with the recital. And if so, then it was clear that such a bequest over was not bad for remoteness, because the expression, "in default of leaving issue," as applied to personal estate, means issue living at her death. The contention, therefore, was, that even if the gift to the daughter for life, and after her death to her issue, was to be construed as an absolute bequest to her, yet she took it, according to *Lyon v. Mitchell*, 1 Mod. 467, subject to an executory bequest over in the event of her leaving no issue surviving her. On the part of the defendants, it was argued that the case of *Knight v. Ellis* has been in effect overruled by *The Attorney-General v. Bright*, 2 Keen, 57, and *Jordan v. Lowe*, 6 Beav. 350, and that it is now established that a bequest of personal estate to A for life, and after his death to his issue gives him the absolute interest. And with respect to the bequest to the issue being to them as joint tenants or tenants in common, it was contended that this is immaterial; for that the same rule must prevail in this respect with regard to bequests of personalty, as has been established with regard to devises of real estates since the decision of *Jesson v. Doe*, 2 Bligh. 1. And, as to the effect of the codicil, it was argued that an erroneous reference in a codicil to the dispositions of the will cannot constitute a new bequest in opposition to the will; and *Skerratt v. Oakley*, 7 Term Rep. 492, was relied on. But it appears to us that the argument with respect to the effect of the codicil when rightly considered is, not that the will is at all revoked or varied by the codicil, but rather that the will and codicil being all one testament, the language of the will may be interpreted by that of the codicil, and that accordingly the gift over in the will, "in default of such issue," being capable of importing a bequest over on failure of issue living at the death, it ought to be inferred that the testator employed it in that sense, because, in the codicil, he refers to it as if it were a gift over in default of his daughter's leaving issue, which, as regards personalty, is tantamount to a gift on failure of issue living at her death. The argument thus viewed appears to us to be well founded, and we are therefore of opinion that even if the preceding limitation conferred an absolute interest on the daughter, such gift was subject to a good executory bequest over in favor of the plaintiffs, who are consequently entitled to our judgment.

Judgment for the plaintiffs.

Ellaby v. Moore.

ELLABY v. MOORE.¹

May 9, 1853.

Practice — Common Law Procedure Act — Reg. Gen. r. 50 — Motion for New Trial.

The plaintiff, on the 24th of March, gave notice of trial for the first sittings for London in Easter term, and on the 20th of April gave notice of his intention to enter and try the cause as undefended at the second sittings. The defendant accordingly did not appear at the first sittings, on the 22d of April, when the cause was tried, and a verdict found for the plaintiff. The defendant, on the 6th of May, moved for a rule to set aside the proceedings for irregularity:—

Held, that he ought to have moved within four days from the day of trial.

In this case the plaintiff gave notice of trial, on the 24th of March, for the first sittings for London in last Easter term; and on the 20th of April served a notice of his intention to enter and try the cause as undefended at the second sittings for London in Easter term. The defendant treated this latter notice as a notice of trial by continuance from the first to the second sittings, and did not appear at the first sittings, on the 22d of April, when the cause was taken in his absence, and a verdict found for the plaintiff for 22*l.* 13*s.* 6*d.*

Hawkins, on May 6th, obtained a rule calling upon the plaintiff to show cause why the trial and verdict, and all subsequent proceedings, should not be set aside for irregularity, with costs, against which —

Wood now showed cause. This motion was made too late. By the 50th rule, issued in pursuance of section 233 of the Common Law Procedure Act, "no motion for a new trial shall be allowed after the expiration of four days from the day of trial, nor in any case after the expiration of the term, if the cause be tried in term." The cause was tried on the 22d of April, and the motion was not made till after the expiration of four days, not till the 6th of May.

Hawkins, in support of the rule. This application may be made at any time before the time has elapsed for taking the next step in the cause. Here no step could have been taken till fourteen days after the trial, as speedy execution was not granted. The plaintiff has an affidavit of merits.

[JERVIS, C. J. It is safer to hold strictly to the rule, and the defendant has not come in proper time. Suppose no notice had been given here, and there had been a trial and verdict, and the defendant had known of it, he must have come within four days. If the de-

¹ 22 Law J. Rep. (N. S.) C. P. 253.

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endant brings 50% into court to-morrow, the rule for a new trial will be absolute, without costs; otherwise it will be discharged, with costs; and if the defendant fails on the second trial, he must pay the costs of the first also.

Per Curiam—

Rule accordingly.

JEWELL v. PARR, (or PARKER.)

May 26 and 27, 1853.

*Bill of Exchange — Accommodation Bill — Re-issue without Stamp
— Evidence of Negotiation and Payment.*

In an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded that he accepted for the accommodation of the drawer, that the drawer negotiated the bill for his own use, and paid it when it became due; that it was afterwards delivered by the holder to the drawer, who then, without the consent of the defendant, indorsed it to the plaintiff, without having it re-stamped. The bill, on being produced at the trial, had the name of the drawer on the back, and a memorandum of the date when it was due on the face of it; and it appeared that the drawer delivered it to the plaintiff after that date:

Held, that this was no evidence to go to the jury in support of the allegations in the plea, that the bill was negotiated by the drawer, and paid at maturity, — commenting on *Lazarus v. Cowie*, 3 Q. B. Rep. 459.

Quære, whether the plea was good.

THIS was an action by the indorsee against the acceptor of a bill drawn by J. F. Allen, upon and accepted by the defendant, and indorsed by Allen to the plaintiff.

Second plea, that the bill was accepted before it became due, at the request and for the accommodation of J. F. Allen, to enable him to raise money thereon, or indorse the same for his own use before the same should become due, and not otherwise, and there never was any value or consideration for the said acceptance or payment by the defendant of the amount of the said bill or any part thereof, except as aforesaid, and that the said J. F. Allen negotiated the said bill for his own use and benefit, according to the said terms, and paid it when it became due, and the same was then delivered to the said J. F. Allen, by the then holder thereof, fully paid, satisfied, and discharged, and that the said J. F. Allen afterwards, and after the said bill had been so paid, and when it was overdue, according to the tenor and effect thereof, without the authority of the defendant, indorsed the said bill to the plaintiff, the same not having been re-stamped after such payment. Issue thereon.

The case was tried, before Talfourd, J., at the Middlesex Sittings, after Easter term, when it appeared that the bill was accepted for the

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accommodation of Allen, who died a short time before the trial, and who had delivered the bill to the plaintiff, immediately before his death. The bill was never presented to the defendant for payment till shortly before the action was brought. The bill, on production, was found to have Allen's indorsement upon the back of it; and also a memorandum of the day when it became due on the face, the handwriting of which was not proved; and it was not re-stamped. The learned Judge left it to the jury to say, whether the bill was accepted for Allen's accommodation, and whether he negotiated it in his lifetime, and paid it when due; and they answered in the affirmative, and found a verdict for the defendant. Leave was reserved to the plaintiff to move to enter a verdict for him.

A rule *nisi* having been obtained to set aside the verdict, and enter a verdict for the plaintiff, or for a new trial,—

May 26. *Thomas*, Sergt., and *Hayes* showed cause. The existence of the memorandum upon the bill is evidence that it was negotiated, as it must be presumed to have been made by some person having an interest in the bill, to whom it had been indorsed; and the fact that the bill was in the hands of the drawer, raises the presumption that he had paid it.

[MAULE, J. The memorandum is scarcely enough of itself to prove that the bill had been negotiated, because it might have been made by the drawer when he was attempting to get it negotiated.]

It was, at all events, some evidence to go to the jury along with the other circumstances of the case. It is presumed that a bill is accepted within a reasonable time after the drawing, *Roberts v. Bethell*, 12 C. B. 778; s. c. 14 Eng. Rep. 218, and it may equally well be presumed that an indorsement takes place within a reasonable time after the acceptance. It may also be presumed that the memorandum was made at the same time as the indorsement and the negotiation of the bill.

[CRESSWELL, J. Or at the time of an attempted negotiation.]

Moreover, it may be presumed, that an accommodation bill has been negotiated, and that presumption is strengthened by the memorandum. Then, if the bill was negotiated, it may be inferred that it was paid when due, if it be found after that time in the hands of the drawer.

May 26 and 27. *Byles*, Sergt., and *Wood*. There was no evidence to go to the jury in support of the plea. The defence is founded upon the Stamp law; and it was necessary in order to support it to show that the bill had been negotiated before it was due, and had been paid at maturity by the party liable upon it. It is founded upon the case of *Lazarus v. Cowie*.

[MAULE, J. There seems to be a defence without reference to the Stamp laws. Apart from the Stamp laws, if the defendant accepted for the accommodation of the drawer, who paid the bill when due, and afterwards re-issued it, might not the acceptor insist that his contract was to pay the bill in the event of the drawer not paying it, and

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When the drawer paid the bill, then the acceptor's liability was at an end? *Beck v. Robley*, 1 H. Black. 89, n.

Without considering the Stamp law, if the accommodation acceptor leave the bill in the hands of the drawer, he will be liable to an innocent indorsee.

[MAULE, J. If a bill be re-issued with the acceptor's consent, then the Stamp law requires a new stamp; but if the bill be re-issued without his consent, then there is a defence without the Stamp Act.]

Here, the defence is, that the bill was paid by Allen after it was due, so as to make a new stamp requisite. The payment of a bill does not of necessity stop its currency. *Harmer v. Steele*, 4 Exch. Rep. 1; *Carruthers v. West*, 11 Q. B. Rep. 143; and *Stein v. Yglesias*, 1 Cr. M. & R. 565; show that an accommodation bill may be indorsed after it is due. It ought, therefore, to have been proved, that the bill was indorsed, and that it was paid when due. There was not in this case evidence either of negotiation or of payment.

JERVIS, C. J. I think that this rule should be made absolute. The chief question arises upon the second plea, which is founded upon the case of *Lazarus v. Cowie*, and which, for the purpose of the present argument, we must assume to be a good plea. I do not, indeed, concur in the opinion of the Court of Queen's Bench in that case, for I do not understand why a bill, because it requires a new stamp, is a bill which could be re-issued if there were no Stamp law. I think it is not correct to say, that the drawer of an accommodation bill is the party who is to pay. The acceptor is the first party bound to pay upon the bill, whatever claim he may have against the drawer. In order to prove the plea, it was necessary to show that the bill was issued before it was due; that it was paid when due, and that it was then re-issued, when it would be void, because the original stamp was exhausted, and no new one affixed. But these facts not having been proved, the jury were not warranted in finding for the defendant upon the plea. With respect to the indorsement, which is a fact relied upon in argument, certainly, in the ordinary course of business, a bill which is not to be negotiated is not indorsed till it is to be put in circulation; but on the other hand, a person holding an accommodation bill, and who is, therefore, anxious to negotiate it to raise money, will be likely to indorse it for that purpose. Then, as regards the memorandum upon the bill of the time at which it would become due, it is true that it might have been made by a subsequent holder of the bill; but it is equally probable that it might have been made by the drawer himself when endeavoring to negotiate it. The indorsement and the memorandum, therefore, are quite consistent with the fact of the bill never having been negotiated; and I think there was no evidence from which a jury would have been justified in finding that fact proved. Moreover, there was no proof of the payment alleged. If there had been any evidence of the negotiation of the bill, the fact of its being in the drawer's possession might have been evidence of payment. It may be, that if the drawer ever parted with the possession of the bill at all, it was only by way of pledge. For

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these reasons, I am of opinion, that there was no evidence to support either of the allegations in the plea. I think, therefore, that the verdict ought to be entered for the plaintiff.

MAULE, J. I am of the same opinion. I think there was no evidence to warrant the jury in finding that the material allegations were proved. It cannot, perhaps, be said with propriety that where the facts proved are consistent as well with the negative as with the affirmative of the allegation sought to be established, there is no evidence to go to a jury. If that rule were laid down, it might in many cases exclude evidence, which, though slight, ought to be submitted to the jury. It is a question of degree which cannot be measured arithmetically. Applying the principle, *De minimis non curat lex*, when it is said there is no evidence to go to the jury, we mean that there is no sufficient evidence reasonably to satisfy a jury that the fact is proved; but there may be evidence such as to satisfy a jury notwithstanding that the contrary of the fact is consistent with the evidence. For example, when the question at issue is, whether a document was written by a certain person or not, and a witness conversant with that person's handwriting, says he believes it was written by him, it is quite consistent with his evidence that the document was not written by him, and yet a jury would be well justified in finding on that evidence that it was, even though other witnesses should state their belief that the handwriting was not that of the person in question. In the case of presumptive evidence of facts, all possibility of the contrary is not to be excluded. A high degree of probability must often be treated as amounting to certainty. Even in criminal cases, it constantly happens that evidence is acted upon, even to the infliction of the extreme penalty of the law, which does not exclude the possibility of a state of things consistent with the innocence of the party charged. In the present case, however, there is not even a presumption raised in favor of the truth of the plea. It is quite as probable upon the evidence, that the bill was not paid by the drawer when due, and afterwards re-issued, as that it was. In the case of *Lazarus v. Cowie* the court placed the defence entirely upon the 19th section of the Stamp Act, saying, that the payment by the accommodation drawer was equivalent to payment by an acceptor for value, and operated to discharge the bill and put an end to it. That doctrine may, perhaps, be called in question; but the court in that case based its decision upon the assumption, that payment by the accommodation drawer discharged the bill entirely; and if that be so, it could not be contended that he could afterwards re-issue the bill in order to charge somebody else; and if payment by such a drawer be equivalent to payment by an acceptor for value, that would be a good defence, independently of the Stamp Act, because the fresh indorsement would be an attempt to render the acceptor and other parties liable upon a new bill. The plea of *Lazarus v. Cowie*, it may be observed, did not allege that the bill was re-issued without the consent of the acceptor, and supposing it to have been re-issued with his consent, then without the Stamp Act that would

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have charged him as upon a new bill, his consent operating as a re-issue of his acceptance. In such a case, the Stamp Act would have been the only defence. The court may have tacitly proceeded upon that ground, considering a bill re-issued as a new bill. Besides, in that case, the plea admitted the acceptance alleged in the declaration, and, therefore, that the bill was issued by the authority of the defendant; and then the sole defence would be founded upon the want of a new stamp, the former one being *functus officio*. In the present case, there being no evidence to establish the defence raised, the acceptor will have to pay the bill, and can have his remedy against the estate of the drawer.

CRESSWELL, J. I am of the same opinion, and in order to decide the question before the court, it is quite unnecessary to say, whether the plea be good or bad. At the trial, leave was given to the plaintiff to move to enter a verdict in his favor, and we are bound to make his rule absolute for this purpose, if there was no evidence to be submitted to the jury in support of the plea. Now, there were but two facts established, the one being the memorandum on the face of the bill, and the other, the name of the drawer upon the back of it. These facts might raise some suspicion or surmise, but they would scarcely be sufficient to enable a person to form a judgment upon the question. No jury could really find from these facts that the bill had been negotiated; and the evidence, therefore, was not fit to go to the jury.

TALFOURD, J. I still retain the opinion which I expressed at the trial, that there was no evidence to go to the jury in support of the material allegations in the plea.

Rule absolute.

GIBBS and another v. FLIGHT and another.¹

June 2, 1853.

Judge's Order — Rule of Court — Conditional Order to pay Money — Execution — Practice.

In an action of trover, by churchwardens, to recover a parish book, Erle, J., to whom the cause was referred after verdict, by consent of the parties, made an order, which was made a rule of court, that the costs of both sides should be paid by the parish. The cause came on for trial a second time, when, by like consent, it and all matters relating to it were, by order of Nisi Prius, which was made a rule of court, referred to Williams, J., to direct in what manner the order of Erle, J., was to be carried into effect. Williams, J., on the 10th of August, 1852, made an order upon the defendants to pay the plaintiffs their costs on the 1st of March, 1853, "unless in the mean time the sum be paid to the plaintiffs out of the parish funds." This order was made a rule of court in Michaelmas term, 1852, and

¹ 22 Law J. Rep. (N. S.) C. P. 256; 1 Common Law Rep. 329; 17 Jur. 1034.

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the defendants not having paid the money on the 1st of March, 1853, execution was issued against them:—

Held, first, that the order of the 10th of August was a Judge's order, and not an award, and that Williams, J., had not exceeded his authority in making it.

Secondly, that the order being conditional, was not an "order to pay money," within the meaning of the 1 & 2 Vict. c. 110, upon which execution could issue.

TROVER, by the plaintiffs, as churchwardens of St. Stephen's Walbrook, for a book belonging to the parish.

Pleas — First, that the plaintiffs were not churchwardens; secondly, that the plaintiffs were not possessed as churchwardens; thirdly, not guilty.

The action came on for trial in December, 1844, when a verdict was found for the plaintiffs, subject to a special case, with liberty to turn it into a special verdict. In Michaelmas term, 1846, judgment was given on the special case, and the court directed a nonsuit to be entered, being of opinion that the election of the plaintiffs as churchwardens was invalid.

After this judgment had been delivered, it was referred to Erle, J., to settle the special verdict, and on the 26th of February, 1848, a memorandum to the following effect was signed by the counsel on both sides:—"The judgment of the Court of Common Pleas to stand, and the select vestry to be at an end, they undertaking not voluntarily to raise the question again. The costs of both sides to be paid out of the parish funds. If either party require it, a formal document to be drawn up, embodying the above, to be settled by Talfourd, Sergt., and Mr. Cowling, or such person as they shall appoint." This memorandum was made an order by Erle, J., dated the 26th of February, and this order was, in Hilary term, 1848, made a rule of court on motion by the plaintiffs. Difficulties having arisen in carrying out this order, a *venire de novo* was directed by the Court of Error, and the cause came on again for trial on the 14th of June, 1850, when an order of Nisi Prius was made, with the consent of both parties, that a juror should be withdrawn, and that the cause and all matters relating to it should be referred to Erle, J., who was to have power to direct in what manner the former rule of Hilary term, 1848, was to be carried into effect, and from time to time to direct and decide what ought to be done, and that in case of any doubt respecting the construction of his lordship's order, or any thing relating thereto, the matter should be referred back to him, *toties quoties*, and that the costs of the special jury should be in his lordship's discretion; and that if his lordship declined to accept the above reference, then this cause, and all matters relating to it, should be referred to Williams, J., who was to have in every respect the same powers; and that either of the said parties should be at liberty to move the Court of Common Pleas that the said order might be made a rule of court.

This order of Nisi Prius was, on the 11th of July, 1850, made a rule of court, on motion by the plaintiffs; and Erle, J., having declined to accept the reference, Williams, J., undertook it, and directed that the costs in the action of the plaintiffs and of the defendants

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respectively should be taxed, as between attorney and client, and the same were respectively taxed by one of the masters of the court. the plaintiffs' at 1,735*l.* 5*s.* 5*d.*, and the defendants' at 1,005*l.* 7*s.* 7*d.*

On the 10th of August, 1852, Williams, J., made an order which, after reciting the rule of court of Hilary term, 1848, and the rule of court of Trinity term, 1850, proceeded as follows: "And whereas the said Mr. Justice Erle declined to accept the said reference, and I, the undersigned, have taken on myself the burden of the same; and whereas the costs of the plaintiffs, of and relating to the said cause, have been taxed at the sum of 1,735*l.* 5*s.* 5*d.*; and whereas doubts have arisen respecting certain matters relating to the said order of the said Mr. Justice Erle, namely, respecting the manner in which the said former rule of Hilary term, 1848, is to be carried into effect, and what from time to time ought to be done for the purpose of carrying the same into effect; I, upon hearing counsel on both sides, and upon reading the affidavits of the plaintiffs and defendants respectively, do order, direct, and decide that the defendants do pay to the plaintiffs, at the office of their attorneys, Messrs. Phillips & Sons, 11 Abchurch Lane, on the 1st day of March, 1853, between the hours of ten and four, the said sum of 1,735*l.* 5*s.* 5*d.*, unless in the mean time the said sum be paid to the plaintiffs out of the funds of the parish of St. Stephen, Walbrook.

"EDWARD VAUGHAN WILLIAMS."

In Michaelmas term, 1852, this order was, on motion by the plaintiffs, made a rule of court, and the defendants not having paid the plaintiffs the 1,735*l.* 5*s.* 5*d.* on the 1st of March, the latter informed the defendants that execution would be issued against them for that sum, upon which application was forthwith made to a judge at chambers to discharge the rule of court of Michaelmas term, 1852; and on the 5th of March, 1853, Platt, B., made an order, that on the defendants bringing the money into court within a week, all proceedings should be stayed till the fifth day of this term. The defendants, in obedience to this order, paid the money into court, on the 11th of March; and, on a subsequent day,

Bramwell obtained a rule, calling upon the plaintiffs to show cause why the rule of Michaelmas term, 1852, the order of Williams, J., and the execution issued against the defendants should not respectively be set aside, and why the sum of 1,735*l.* 5*s.* 5*d.*, paid into court by the defendants pursuant to the order of Platt, B., should not be paid out of court to the defendants; and why the plaintiffs should not pay to the defendants the costs of and occasioned by the said rule, the said execution, and of this application.

The defendants in their affidavits stated, that at the time the order of Erle, J., was made, they had not in their possession or under their control any moneys or property belonging to the parish of St. Stephen, Walbrook; but that all the moneys, with the exception of certain funds in the Court of Chancery, and all the trust estates of the parish were in the possession or under the control of the plaintiff Gibbs, as

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the sole surviving trustee of the estates of the parish, and that they, the defendants, have not now, nor have they ever had, in their possession or under their control any funds or moneys of the parish, nor have they any means of acquiring or obtaining possession of any such moneys or property, and that, as they verily believe, upon the signing of the memorandum of the 26th of February, 1848, and upon the drawing up the order of Nisi Prius, it was not contemplated or intended by them, or by their counsel or attorney, that they were to be in any event personally liable to pay the plaintiffs' costs, but, on the contrary, that the arrangement, upon the drawing up the order of Nisi Prius, expressly provided for the carrying out the rule of Hilary term, 1848, which directed the costs of both sides to be paid out of the parish funds.

Thesiger and *Cowling* showed cause. The order of *Williams, J.*, was not an award, but a judge's order. *Wilson v. Northrop*, 4 Dowl. P. C. 441; it was originally intended, and has been throughout these proceedings treated as such.

[CRESSWELL, J. If it was not a judge's order, there was no foundation for the rule of court of last Michaelmas term.]

The order was made in conformity with the counsel's arrangement, and they consented that an order, i. e. a judge's order, should be made. They agreed that a certain thing should be done by means of a certain instrument, which meant that it should be done in the particular way in which that instrument operated. The order was made on the 10th of August, a copy of it was served on the defendants and on their attorney on the 11th. It was made a rule of court on the 2d of November, and on the 4th the rule was served on the defendants and on their attorney. On the 6th, the order was registered as required by the 1 & 2 Vict. c. 110. On the 12th, a certificate of its registration was served on the defendants and on their attorney, and they took no notice of it during that Michaelmas term and the following Hilary term, nor until after the plaintiff was entitled to take out execution. It is now too late to set it aside. *Thomson v. Carter*, 3 Dowl. P. C. 657; and *Clements v. Weaver*, 4 Sc. N. R. 220. Secondly, this is an order on which execution can issue under the 1 & 2 Vict. c. 110.

[CRESSWELL, J. The order contains an alternative; ought it not to be an absolute order for the payment of money, to come within the statute?]

It is an alternative order made absolute by lapse of time, the condition not having been fulfilled. The condition "unless the sum be paid to the plaintiffs out of the funds of the parish," was for the relief of the defendants; and they take advantage of it by way of defence to any execution that may be issued. It is no objection that the order is in the alternative, and no difficulty can arise in issuing execution on it. It is analogous to the judgment in an action of detinue, which is always in the alternative, for the goods or their value. Chitty's Forms, 105, 152, and on that judgment execution issues.

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Bramwell, Willis, and T. Jones, in support of the rule. There is no affidavit that this order was made by consent, nor does the order itself say so; if it did, it would no doubt be analogous to the judgment in an action of detinue. But such an order as this can only be valid by consent, for a judge *quà* judge, has no power to make such an order. It can, in fact, only stand as an award. *Harrison v. Wright*, 13 Mee. & W. 816; but as an award it is bad, and, being bad as an order also, it has no validity at all. Secondly, there was no power to make this order a rule of court. As an award it could not be made a rule of court; and as an order for the payment of money, being in the alternative, it does not come within the statute. No execution can issue on it, for if the writ follow the order it is bad, as the sheriff must first ascertain whether the parish has paid the plaintiffs, the order being conditional, and if the writ varies from the order, it is also bad.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

JERVIS, C. J. This was an application to set aside an order of Williams, J., which was made a rule of court, and the execution which has issued upon it; and, also, to compel a return of the money paid into court, under an order of Platt, B., the payment of the money into court being the condition upon which he stayed the proceedings. It is unnecessary, in the view which we take of the case, to discuss several points which were raised. The first question is, whether the order of Williams, J., can be set aside on the ground that he had no authority to make such an order? We are of opinion that this part of the rule must be discharged, because we think that, under the circumstances, he had power to make the order. The subject-matter of which he was to dispose was the order of Erle, J., not an award. It is true, that when it was left to him to say what was the effect of the order, the mode in which it was left to him might bear the construction that it was intended to be in the nature of a reference; but, as the mode in which he was to pronounce his judgment was not pointed out, it was left to him as a judge to decide on the effect of a judge's order; and we think it was intended, and that the order is in substance this — that he should act in the ordinary way in which a judge acts, by judge's order; and that, in making an order accordingly, he did not exceed his authority. Being a judge's order, it was, as a matter of course, made a rule of court; and, therefore, that part of the rule which seeks to set aside the order and the rule made thereon must be discharged. It is unnecessary, however, to decide whether the learned judge exceeded his authority in the order he made. It might be contended that, having selected him as the person to put a construction upon the order of Erle, J., and he having

¹ JERVIS, C. J., CRESSWELL, J., WILLIAMS, J., and TALFOURD, J., having been counsel in the cause, took no part in its decision.

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done so, the parties were bound by his decision. But then comes the question as to the execution, founded on the rule of court, whether the order is an "order to pay money" under the statute of Victoria. And, upon that point, we think that the execution must be set aside; for we cannot consider that an order to pay money upon a condition, under such circumstances as in the present case, is such an order as will satisfy the statute. We, therefore, think that, so far as this rule seeks to set aside the execution founded upon the rule of court, it ought to be made absolute; and, as the necessary consequence, that the money paid into court must be paid out to the defendants; but, as they asked more than they were entitled to, we think it must be without costs.

Rule accordingly.

UDNEY v. EAST INDIA COMPANY.¹

June 6, 1853.

Income-tax — Annuitant of E. I. C. resident abroad, exempt.

A civil servant of the E. I. C. in receipt of an annuity out of the Civil Service Pension Fund, is entitled, while resident abroad, to receive it free from income tax.

THIS was a special case, which stated that the plaintiff was a civil servant of the East India Company, resident at Boulogne, and entitled to an annuity of 1,000*l.*, payable quarterly out of a fund composed of money subscribed by the civil servants themselves at the rate of four per cent. upon their salaries, and money contributed by the East India Company in equal proportion to that subscribed; the whole fund being invested and managed in India. That, by an arrangement with the East India Company, the annuitants have the option of receiving the annuity in India from the managers of the fund, or of being paid at the East India House in London, the company being in that case provided with money out of the fund for the purpose of making the payment. The plaintiff had elected to receive his annuity in London, and had received a certificate stating him to be entitled to demand and receive from the Court of Directors of the India Company in London the sum of £ —.

The plaintiff in person contended that he was entitled to receive the annuity free from income-tax, the fund out of which it was paid being located in India, and he himself being resident abroad.

Watford, contra, contended — first, that the company paid the annuity out of their revenue, and that was to be taken as if in Eng-

¹ 17 Jur. 1078; 21 Law Times Rep. 185; 22 Law J. Rep. (N. S.) C. P. 260.

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and ; secondly, that the company were not liable by action, the 27th section of the act making it imperative upon the company to pay the assessment made by the directors, and giving a remedy by appeal against the assessment.

CRESSWELL, J. The case does not state that there was any assessment ; and your second point does not arise.

The court were of opinion, upon the first point that, the fund being stated in the case to be invested in India and managed there, the money was received by the plaintiff at Calcutta through agents in London, and was free from the tax.

Judgment for plaintiff.

MOFFATT v. DICKSON, clerk, &c.¹

April 25, and June, 3, 1853.

County Lunatic Asylum — Probationary Plans, Liability for.

A declaration against the clerk to a committee of visitors of a county lunatic asylum, under the 8 & 9 Vict. c. 126, ss. 16, 17, stated, that the committee under the statute agreed with the plaintiff, in consideration that he would render his services as an architect in examining the site of a proposed lunatic asylum, and preparing the requisite probationary drawings for the committee, and all other drawings required to be submitted to the Commissioners in Lunacy and the Secretary of State, that a certain sum should be paid to him, and averred that he did prepare requisite probationary drawings for the approval of the said committee, and was ready to prepare all other drawings to be submitted to the commissioners and Secretary of State, but that the committee wrongfully discharged him, and prevented him from completing the agreement. Second plea, that the plaintiff did not prepare the requisite probationary drawings. Fifth plea, that a reasonable time had elapsed for the plaintiff to prepare the requisite probationary drawings for the approval of the said committee, and that the plaintiff prepared divers drawings which were not approved of by the committee, but rejected by them, and that, save as aforesaid, the plaintiff did not prepare any probationary drawings for the approval of the committee, wherefore, &c. : —

Held, that "probationary" drawings meant drawings to be approved of by the committee, the commissioners, and the Secretary of State ; that if any of the visitors could contract for the payment for plans not approved of, yet there was no contract here which would make them liable for dismissing the plaintiff ; and that the plaintiff could not recover on the *indebitatus* counts.

Quære, first, whether the visitors had power to contract for the payment for plans not ultimately approved of ; secondly, whether mandamus to the treasurer of the county would be the proper remedy in such a case ; thirdly, whether the clerk could be sued ; and whether the county would be liable on such a contract.

THE first count of the declaration stated, that the plaintiff complained of William Dickson, who before and at the time of the commencement of this suit, had been and was duly nominated and appointed, and was accordingly then and still is, according to the

¹ 22 Law J. Rep. (N. S.) C. P. 265 ; 1 Common Law Rep. 294 ; 17 Jur. 1009 ; 13 Common Bench Rep. 543.

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force, form, and effect of the several statutes hereinafter mentioned, clerk to the visitors acting under and by virtue and in pursuance of a certain act of parliament, made and passed in a session of parliament held in the eighth and ninth years of the reign of Her Majesty Queen Victoria, intituled "An act to amend the laws for the provision and regulation of lunatic asylums for counties and boroughs, and for the maintenance and care of pauper lunatics in England;" and of a certain other act of parliament of the ninth and tenth years of the reign of Her Majesty Queen Victoria, intituled "An act to amend the law respecting lunatic asylums, and the care of pauper lunatics in England;" and of a certain other act of parliament made and passed in a session of parliament, held in the tenth and eleventh years of the reign of Her Majesty Queen Victoria, intituled "An act for the amendment of the laws relating to the provision and regulation of lunatic asylums for counties and boroughs in England;" and who has been summoned to answer the said W. Moffatt, according to the force, form, and effect of the said statutes. For that whereas after the passing of the said several statutes above mentioned, and according to the force, form, and effect, and in pursuance thereof, a committee of visitors had been appointed and elected for the visitation, management, providing, and erecting of an asylum for the pauper lunatics of the county of Northumberland; and thereupon, by a certain agreement then made by and between the said plaintiff and the said committee of visitors, by virtue and in pursuance of the said several statutes above mentioned, it was agreed that in consideration that the said plaintiff would render his services as an architect, in examining the site of the proposed lunatic asylum, for the pauper lunatics of the said county of Northumberland, and preparing the requisite probationary drawings for the approval of the said committee of visitors, and all other drawings and documents required to be submitted to the commissioners in lunacy, and afterwards to the secretary of state, according to the said several statutes above mentioned in that behalf made and provided, and subsequently would prepare the whole of the working drawings, estimates, and specifications for an asylum to contain 200 pauper lunatics and patients, the said committee of visitors for the visitation, management, providing, and erecting of such asylum, as in that behalf aforesaid, agreed with the said plaintiff that they would pay to him the sum of 437*l.* 10*s.* And the said plaintiff avers, that although he did afterwards, and before this suit, render his services in examining the site of the proposed lunatic asylum, and did prepare the requisite probationary drawings for the approval of the said committee of visitors, and hath always been ready and willing to prepare all other drawings and documents required to be submitted to the Commissioners in Lunacy, and afterwards to the Secretary of State, as in that behalf aforesaid mentioned, and subsequently to prepare the whole of the working drawings, estimates, and specifications for an asylum for 200 pauper lunatics and patients, of all which premises the said committee of visitors had due notice, yet the said plaintiff in fact, saith that the said committee of visitors did not, nor would permit or suffer the said

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plaintiff to proceed to complete the said agreement, and then wholly hindered and prevented him from so doing, and then wrongfully discharged him from any further performance or completion of the said agreement and promise, whereby the said plaintiff hath lost and been deprived of the profits and advantages which he otherwise might and would have derived and acquired from the completion of the said works. Second count, that whereas also the said committee of visitors heretofore, to wit, on the day and year last aforesaid, were indebted to the said plaintiff in the sum of 600*l.* for the work and labor, care, diligence, and attendance by the said plaintiff done, performed, and bestowed as an architect in and about the examining divers sites for buildings, and the drawing divers plans, elevations, and sections of buildings for the said committee of visitors at their request, under and in pursuance of the said several statutes above mentioned, and in and about divers other works for the said committee of visitors at their request, under and in pursuance of the said several statutes above mentioned, and for divers journeys and attendances of the said plaintiff, in and about the business of the said committee of visitors at their request, under and in pursuance of the said several statutes above mentioned; and in 600*l.* for the money found to be due to the said plaintiff from the said committee of visitors, under and in pursuance of the said several statutes above mentioned, upon an account then stated between the plaintiff and the said committee of visitors; and thereupon the said committee of visitors, in consideration of the premises in the said last two counts respectively mentioned, to wit, on the day and year last aforesaid, promised the plaintiff to pay him the several sums of money in the last two counts respectively mentioned.

Pleas — First, as to the first count, that the said committee of visitors did not promise in manner and form as in that count alleged. Secondly, to so much of the first count of the declaration as relates to the non-performance by the said committee of the said agreement, and of their promise in that count mentioned, that the plaintiff did not prepare the requisite probationary drawings in the said count mentioned as alleged. Thirdly, as to the same, that the plaintiff did not prepare the working drawings in the first count mentioned; fourthly, to so much of the first count of the declaration as relates to the said committee not permitting or suffering the plaintiff to proceed to complete the said agreement, and hindering and preventing him from so doing, and wrongfully discharging him from any further performance or completion of his said agreement and promise, that a reasonable time had elapsed after the making of the said agreement, and before the said time when, &c., in the said first count in that behalf mentioned for the plaintiff to prepare, and within which he might and ought to have prepared the requisite probationary drawings of the proposed lunatic asylum, for the approval of the said committee; nevertheless, the plaintiff, though often requested by the said committee so to do, did not nor would, after the making of the said agreement and before the said time when, &c., or at any other time, prepare the said drawings, to wit, the requisite probationary drawings

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of the said proposed lunatic asylum for the approval of the said committee; wherefore the said committee, to wit, at the time in the said first count in that behalf mentioned, discharged the said plaintiff from the further performance and completion of his said agreement, and refused to permit him to complete the same, as they lawfully might for the cause aforesaid. Fifthly, as to so much of the declaration as relates to the said committee not permitting or suffering the plaintiff to proceed to complete the said agreement, and hindering him and preventing him from so doing, and wrongfully discharging him from any further performance or completion of his said agreement and promise, that a reasonable time had elapsed after the making of the said agreement, and before the said time when, &c., for the plaintiff to prepare, and within which he might and ought to have prepared, the requisite probationary drawings of the said proposed lunatic asylum for the approval of the said committee; that the plaintiff did, after the making of the said agreement, and before the said time when, &c., prepare divers, to wit, ten drawings, to wit, of the said proposed lunatic asylum for the approval of the said committee: but the defendant says that the last-mentioned drawings were not approved of by the said committee; on the contrary, the defendant says, that the said drawings were disapproved of and rejected by the said committee, whereof the plaintiff had notice; that, save as aforesaid, the plaintiff did not prepare any probationary drawings of the said proposed lunatic asylum for the approval of the said committee; wherefore the said committee did, to wit, at the time in the said first count in that behalf mentioned, discharge the plaintiff from the further performance and completion of his said agreement, and did refuse to permit him to proceed to complete the same, as they lawfully might, for the cause aforesaid; verification. Sixthly, to the first count, that the plaintiff was not ready or willing to prepare the drawings and documents required to be submitted to the Commissioners in Lunacy, and afterwards to the Secretary of State, as in the first count mentioned as therein alleged. Seventhly, to the second count, payment into court of 100%. The plaintiff joined issue on all the pleas, except the third, and to that he demurred, and had judgment on the demurrer.¹

¹ The 8 & 9 Vict. c. 126, s. 17, enacts, "That the committee of visitors for any county or borough, counties or boroughs, for which an asylum or an additional asylum, or additional accommodation for pauper lunatics, shall for the time being be required, shall, subject as hereinafter mentioned, procure, examine, and determine on plans and estimates of, and contract for, the purchase of lands and buildings, (and in the case of buildings either with or without any fittings-up and furniture belonging thereto,) and for building, erecting, altering, improving, restoring, furnishing, and completing an asylum, or additional asylum, or additional accommodation for the pauper lunatics of the county, &c., for which such visitors, or such of them as shall not be elected by subscribers as aforesaid, shall be appointed, or for those of the same pauper lunatics for whom there shall not be proper accommodation in any existing asylum, or, with the consent of the said Poor Law Commissioners, and of the guardians or overseers of the parish or union, for adapting any workhouse for all or any of the same lunatics who may be chronic lunatics; and, subject as aforesaid, shall also contract for making, laying out, and completing the yards, courts, outlets, grounds, lands, and appurtenances to such asylum,

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At the trial, before Jervis, C. J., at the London sittings after Trinity term, 1852, the following facts appeared in evidence: — On the 18th of March, 1848, the committee of visitors for the managing and erecting a lunatic asylum in the county of Northumberland, passed a resolution authorizing the defendant, their clerk, to write to the plaintiff to inform him “that they were ready to agree to the sum of £37*l.* 10*s.* to be paid to him for his services in examining the site, preparing the requisite probationary drawings for the approval of the committee, and all other drawings and documents required to be submitted to the Commissioners in Lunacy, and afterwards to the

or additional asylum, or workhouse, and also from time to time to purchase any land or buildings for the purpose of enlarging or improving any such asylum, workhouse, or the yards, courts, outlets, grounds, land, and appurtenances thereto; and every contractor shall give to the clerk to such visitors sufficient security for the due performance of the contract; and every such contract, and all orders relating thereto, shall be entered in a book to be kept by the clerk to such visitors; and when such asylum, or workhouse, and appurtenances, or (as the case may be) the additions to, or alterations thereof, shall be declared to be completed, then such book shall be deposited and kept among the records of the county or borough, or, in the case of two or more counties or boroughs having united for the purpose of such contract, among the records of such one of the united counties or boroughs as shall have paid the largest proportion of the expenses of such contract; and every such book may be inspected at all reasonable times by any person contributing to the rates of such county or counties, borough or boroughs respectively, and also if any part of such expenses has been paid by voluntary subscriptions, by any of such voluntary subscribers; and a copy of every such book shall be kept at the asylum or additional asylum which shall have been erected or provided; and all lands and buildings so to be purchased as aforesaid shall be conveyed to such person or persons as the visitors by whom the same shall be purchased shall think fit, in trust for the purposes of this act: Provided always, that the said visitors shall from time to time make their report to the General or Quarter Sessions of the county or borough, counties or boroughs, for which they or such of them as shall not have been elected by subscribers as aforesaid, shall be elected, of the several plans, estimates, contracts, and purchases which shall have been agreed upon, and of the sum or sums of money necessary to be raised and levied for defraying the purchase-moneys and expenses thereof on the county or borough, or, in the case of two or more counties or boroughs having united for such purposes, on each or every of such counties or boroughs, which plans, estimates, contracts, and purchases shall be subject to the approbation of the court or courts of General or Quarter Sessions of such county or counties, and of the justices of such borough or boroughs, before the same shall be completed or carried into execution.”

The 28th section enacts, “That every committee of visitors shall submit all proposals and agreements for uniting counties and boroughs and other asylums for the purposes of this act, and all proposals for building or providing asylums, or the buildings, yards, outlets, or appurtenances thereto, or additional accommodation for pauper lunatics, and all contracts, and all plans which may be intended to be adopted for such asylums, accommodation, and premises to the Commissioners in Lunacy, who shall make such inquiries in reference thereto, and to the lunatics to be provided for, as they shall deem proper, and shall report thereon in writing to one of her Majesty’s principal secretaries of state; and the estimates of the costs and expenses of carrying into execution such contracts for any of the purposes of this act, in reference to the purchase of land, or the building or providing any asylum, or additional asylum or accommodation for pauper lunatics, shall be submitted to her Majesty’s said secretary of state; and no such proposals, agreements, contracts, estimates, or plans shall be accepted, executed, or carried into effect until the same shall be approved of by the said secretary of state by writing under his hand and seal.”

The 16th section directs, “That the committee of visitors shall sue and be sued by their clerk.”

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Secretary of State, and subsequently to prepare the whole of the working drawings. Estimates and specifications for an asylum to contain 200 patients:" and to add that the committee were desirous to have the work commenced as soon as could be made convenient. The clerk accordingly wrote to the plaintiff that the committee were ready to accede to his proposal to pay him the sum of 437*l.* 10*s.* for his services, &c., as mentioned in the resolution. The plaintiff afterwards examined the site of the proposed lunatic asylum, and drew three sets of plans. The first set of plans was laid before the committee in April, 1848, when the committee were of opinion that the arrangement was likely to provide well for the uses intended, but disapproved of the elevation, both from its appearance and its probable cost, and requested the plaintiff to prepare another elevation. The plaintiff proceeded to alter the elevation, being attended in London from time to time by several members of the committee. In the mean time, it was discovered that the site originally proposed for the lunatic asylum had been underwrought for coal; and, accordingly, a new site was selected, but this did not necessitate any alteration in the original plans. The second set of plans was considered by the committee in April, 1849, and was disapproved of, because the style of architecture was much too ornamental and costly, and the plaintiff was required to furnish other probationary drawings of a plain, inexpensive character, for the approval of the committee at the meeting of the 1st of June. At the same time the plaintiff was informed that if this was not done, the committee would feel it to be their duty to lose no further time, and to proceed no further in the business with him. The third set of plans was considered in August, 1849, when the committee resolved that they did not make such provision for the asylum as the committee could approve, and therefore rejected them and determined to proceed no further with the plaintiff in the business. Upon these facts, it was contended at the trial that the defendant was entitled to a verdict upon the issues as to the second and fifth pleas, but the variance between the promise laid in the declaration and the resolution authorizing the defendant to write to the plaintiff, was not pointed out. The Lord Chief Justice saved the points which arose upon those issues, and the jury found for the plaintiff, assessing his damage at 437*l.* 10*s.* upon the first count, and stating that, in their opinion, the work done was worth 437*l.* 10*s.*, if the plaintiff could recover upon the last count. The verdict was entered upon the first count, and leave was given to the plaintiff to move to enter the verdict upon the second count if he could not sustain it upon the first count.

A rule *nisi* having been obtained, cause was shown, in Hilary term, 1853, by *Byles*, Sergt., and *J. Thompson*; and *Knowles* and *Manisty* were heard in support of the rule.

On the 26th of January the court intimated to the counsel that it would be better to amend the first count of the declaration by stating the promise by the committee according to the fact, namely, "that the sum of 437*l.* 10*s.* should be paid to the plaintiff," which amendment was made accordingly. *Cur. adv. vult.*

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JERVIS, C. J., (April 25) delivered the judgment of the court.¹ — After stating the facts of the case as above, he proceeded:] — The declaration has been amended according to the fact, and is now in the terms of the resolution. The question is now upon the record. As to the first plea, the promise is proved as laid, and the defendant may, if he please, move in arrest of judgment, and so raise the question. With respect to the other pleas, we are of opinion that the verdict ought to be entered for the plaintiff upon the second plea. The term “probationary drawings” may mean, drawings to be approved of by the committee, and, if approved of, then to be submitted to the Commissioners and the Secretary of State, or it may mean drawings that are to be approved of by all the requisite parties. If it mean the former, the plea is proved, if the latter, it is not proved. We think that the former is not the proper meaning, and that, therefore, the plaintiff should have the verdict upon this plea. Upon the fifth plea, we are of opinion that the verdict ought to be entered for the defendant. We think that a reasonable time had elapsed within which the plaintiff ought to have prepared the requisite probationary drawings; and it having been proved that all the drawings were rejected which were prepared, the plea is proved. Whether this plea is an answer to the declaration will be a question which the plaintiff may raise by motion to enter judgment *non obstante veredicto*. Upon so much of the plea of *non assumpsit* as applies to the last count, the verdict must be for the defendant. This is the result of our opinion upon the several points, and also of the arrangement which was made at the trial.

Rule accordingly.

Byles, Sergt., in Easter term, obtained a rule *nisi* for judgment for the plaintiff, on the fifth plea, *non obstante veredicto*, —

Knowles, for the defendant, having leave at the same time, to make objections in arrest of judgment.

Knowles and *Manisty* (May 30 and June 3) showed cause. The plea is a good answer to the declaration, and the declaration is bad. The plaintiff was to prepare probationary drawings for the committee, and if the committee disapproved of them, then there was to be an end of the whole matter. By the 17th section of the 8 & 9 Vict. c. 126, the committee are empowered to “examine and determine the plans,” which shows that they are to have a power of approval and disapproval. If they approve, then the next step is to lay them before the Commissioners in Lunacy. The committee were not bound to go on receiving plans from the plaintiff for an indefinite time till he should furnish them with something they could approve of. They had a right to dismiss the plaintiff if he was not competent, and reject his drawings. For his rejected drawings, he could sue only on the

¹ **JERVIS**, C. J., **MAULE**, J., **CRESSWELL**, J., and **WILLIAMS**, J.

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common counts; but his claim is based upon the special contract set out in the first count of the declaration, which is entire, and he is either entitled to recover upon that contract, or not at all. But the declaration is not good. If the committee had no power to agree under the act of parliament so as to bind their clerk, the declaration is bad. But there is nothing in the act enabling the committee to agree to pay for such things as the drawings in question. The clerk of the committee, at all events, could not be sued unless the act was complied with. The declaration shows a wrongful act on the part of the committee, and the county rate surely cannot be made liable for their personal misconduct. Again, the county treasurer is the person to pay, and mandamus is the proper remedy against him.

Byles, Sergt., *Willes*, and *J. Thompson*, for the plaintiff, in support of the rule. The declaration is good. The 17th and other sections of the statute give the committee power to enter into contracts. The 17th section directs them to procure plans, and thereby impliedly gives them authority to do every thing which is necessary for procuring plans, and, therefore, to pledge the credit of the county for the procuring of such plans. If the committee have power to contract for the county, the same things must be incident to a breach of that contract as to that of any other. If the declaration be good, the plea is no answer to it. The plaintiff's right of action was complete when he had prepared a reasonable plan. Looking at the statute, the contract cannot mean that the plaintiff was to be paid for such drawings as all the parties mentioned should approve of. The words "for the approval," in the declaration, are merely descriptive of the drawings. If the case be likened to that of a contract stipulating that work shall be done to the satisfaction of the third party, or paid for on the certificate of a surveyor, as in *Morgan v. Birnie*, 9 Bing. 672, this distinction is to be taken, that here the approval to be obtained would be the approval of the parties contracting to pay, and it would be contrary to legal principles that they should have power to defeat the contract by refusing approval. *Dallman v. King*, 4 Bing. N. C. 105. With regard to the objection that the remedy here is by mandamus and not by action, *Wormwell v. Hailstone*, 6 Bing. 668, is an authority to the contrary. So also are *Jefferys v. Gurr*, 2 B. & Ad. 833; and *The King v. The St. Katharine Dock Company*, 4 Ibid. 360. Whatever difficulties there may be as to execution, the action is properly brought against the clerk. *Cane v. Chapman*, 5 Ad. & E. 647.

JERVIS, C. J. There have been various questions raised during this case, but in the view I take of it, it will not be necessary to go through those various points. It was first contended that the magistrates had no power to make a contract to pay for plans which ultimately were not approved of. Upon that point it is unnecessary to pronounce any opinion in the view I take of the case. We shall not, therefore, say whether that may or may not be so. Secondly, it was objected that if there had been any right to bind the county by that contract on the part of the visitors, this action would not lie, because

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the proper remedy is not by action, but by mandamus, and on the **mandamus** there might be a traverse of the amount due. That would **raise** the question of the validity of the contract, and thus the **mandamus** would afford a complete redress. On that point likewise, **taking** the view I do of the case, it is not necessary that I should **pronounce** any opinion; and, further, it is not necessary to pronounce **any** opinion on the point as to whether, if a contract be made by the **magistrates** on which an action of contract would lie, the clerk could **be** sued for breach of that contract — in other words, whether it would **be** an act within the scope of their authority, and for which the **county** would be liable. This point has been argued with great **learning** on showing cause against the rule; but the main point that **we** have to decide has not received the satisfactory answer that I **think** it deserves in my view of the case, and that is the construction **of** the contract, which I apprehend, after all, is the real question.

Assuming in this case, for the purpose of the argument, that the **magistrates** had power to make a contract to pay for plans that might **not** be approved of, and that if they wrongfully acted they might be **sued** in that form by their clerk, then comes the question whether they **did** or did not make such a contract; and in my opinion they have **not** made a contract that will make them liable to be sued in this form of action for dismissing the architect, and not allowing him to **go** on so as to entitle the plaintiff to maintain the action. Now, in the construction of the contract made, we must look to the character and position of the magistrates who are supposed to have entered into it, as a duty which notoriously devolved upon them by acts of parliament, and, therefore, which the plaintiff must be supposed to have well known they were bound to perform. It was the duty of the magistrates to procure plans, and if they made a bargain, they would be liable perhaps to pay for them; they were to procure plans and exercise their judgment upon them, and, when approved, they were to be submitted to the Quarter Sessions; if approved by the Quarter Sessions, then they were to be submitted to the Commissioners in Lunacy, and if approved by the Commissioners in Lunacy, then they were to be sent to the Secretary of State for final approval and confirmation; and at that time, and not until then, could those plans be carried into effect. Now, in that state of things, let us see what the contract is. The plaintiff knows what must be the duty of the defendants, the visiting magistrates. He well knows the ordeal his plans have to go through, and under those circumstances he makes a bargain to receive a lump sum of 437*l.* 10*s.* for the perfect and entire work, which work is to be of this nature; he is to examine the site and prepare the requisite probationary drawings for the approval of the committee of visitors, the details and other drawings to be submitted to the Commissioners in Lunacy and the Secretary of State, and subsequently and after all that has been done, and not until then, and if they are approved of, then he is to make out the working and detail drawings; and for the whole of that he is to receive 437*l.* 10*s.* Now the course of the contract suggests what we know to be the case. The visiting justices require for their approval an outline of the draw-

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ings, to see the general nature of that which they are to approve of, and the general internal accommodation. The Commissioners in Lunacy and the Secretary of State require also drawings showing the size of the buildings and the external decorations, and therefore the contract, after saying "requisite probationary drawings for the approval of the committee," goes on to say certain other things which the Commissioners of Lunacy will require: for instance, they will require buildings which shall be according to certain regulations as to the ventilation and other matters to which the visiting justices might not have had their attention directed; and subsequently, and after the Secretary of State had approved, the other plans were to be prepared. Now what, in that state of things, is the meaning of the words "for the approval of the said committee of visitors?" Does it mean, or does it not, that I will take upon myself, confident in my skill and experience, and relying upon your honor and your competence to judge,—I will take upon myself to prepare such plans as you will approve of; and if you approve of them, and if they go through all the different stages satisfactorily, I will then do what is necessary to entitle me to receive the 437*l.* 10*s.* I think it is the fair meaning, otherwise what is the meaning of the words "requisite plans for approval?" It is argued that those words mean, plans that you ought to approve of. Now, in common parlance, if a man says to another, I wish to have a certain thing made, and the other man says I will make you a model for your approval, it does not mean a thing absolutely fit for approval; it means such a thing as I am sure you will like and take. But it does not follow, because the man may say that it is very beautiful, but it is not the thing I want, that the other man can bring an action against him for not being allowed to make the piece of plate, or whatever it was, for which he submitted the drawing or model. It has been argued that this cannot be so in the present case, because, although that might be the meaning of it, the plans were to be submitted to the Secretary of State, who is an indifferent and impartial person; it cannot be so here, because they are to be submitted to certain persons who are parties to the contract, and by the rule of law no man can be judge in his own cause. Therefore, he says, where the umpire is one of the parties to the contract, wherever you mean "subject to approval" you mean "fit for approval;" and if you mean fit for approval, then the defendant was bound to approve, because you are to suppose he would have prejudices in favor of his own cause, and, therefore, have no right to exercise any discretion as to approval. But that rule does not apply here. The visiting magistrates have no interest in the case whatever, more than any other inhabitant of the county at large; but in order to prevent the possibility, or to provide against the impossibility, of all the justices representing the county, or all the county represented, deciding upon the question, the act of parliament says you shall select from the magistrates a limited body, and invest them with authority for the purpose, which body the act of parliament says shall have certain powers; but they have, in truth, no interest whatever in the question, because they are merely a representative body.

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I think the fair construction of the contract, therefore, is this:— I will take a sum of money for doing all the work, but I will run the chance of my plans being accepted. If they are not approved of, then I am estopped, and I am not to be paid. I am to prepare the requisite drawings for your approval, of which term I understand the meaning is, you are to approve of them. If you do approve of the plans, then I am to prepare further drawings and receive the money; but if they had a right to reject them there is no agreement to pay any thing, and, therefore, no action will arise upon the contract. Whether this arises upon the declaration or upon the plea, it is unnecessary to say. Possibly, in strict construction, the plaintiff ought to have gone on to say that he prepared the requisite drawings, and that they were approved of, to give him a right to succeed, if I am right in my view of the case. Whether it is in the declaration or not, it is supplied by the plea, because they say though you did prepare drawings for approval we rejected them, and in my opinion they had a right to reject them. Upon that ground, therefore, without touching the other points of the case, I think this rule ought to be discharged.

MAULE, J. I entirely concur with the Lord Chief Justice in thinking that this rule ought to be discharged; and upon the ground that the plaintiff on his declaration, taken in connection with the matters found for the defendant upon the fifth plea, has not any ground of complaint at all. It will be more satisfactory to decide the question upon that consideration alone, than upon the point as to whether, if the plaintiff had sustained any wrong, he has adopted the right mode of getting a remedy, and against the right person. The grounds upon which I think, upon consideration, with the Lord Chief Justice, that the rule to enter a judgment for the plaintiff *non obstante veredicto*, should be discharged, are, that the plaintiff has sustained no wrong, and, therefore, is not entitled to any remedy. It may be considered, and I think will not be denied, that it would have been competent for the committee to engage with a person whom they did not propose to employ afterwards, to produce plans at a certain price or upon certain terms that they might agree upon, whether those plans should be acceptable to them when drawn, or made use of, or not. But that has been a question that has been a good deal argued on the part of the plaintiff. I do not feel disposed to dispute that the committee were competent to do so, if they thought fit; but the question upon this record is, whether they have bound themselves by a contract with the plaintiff to continue to employ him, for it is the not continuing to employ him in the capacity of architect that is the subject of complaint. The plaintiff does not say that they had the benefit of some plans or of his labor which they did not pay for, but what he complains of is, that they have not placed him in a situation to earn 477*l.*, which was the sum to be paid to him in certain events under this contract, and the only sum which, according to the contract as stated in the declaration, he was to be paid. Now, if you look at the terms of the contract, it appears very plain that, whatever they might have done, what they have done is, to agree with the plaintiff that if he make plans which

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ultimately go through and obtain the approval of the other parties in succession, after the defendants, who have the power of determining on behalf of the public (for the committee have really no interest in it at all, and the clerk is a merely nominal defendant,) and do the other things required to be done under the contract by the person who actually acts as architect for the lunatic asylum which is to be erected, then he shall be paid a certain sum of money, and that is the only sum he is to be paid in any event under the contract. Well, unless the contract binds the defendants to continue to employ the plaintiff, he has not the cause of action that is stated in the declaration; and if there was an implied contract that in the event of his plans being rejected, they should be paid for, that is not the thing complained of here. What he complains of is, their not continuing to employ him. Now, no answer was given by the plaintiff's counsel, when he was asked what was to be done supposing the plaintiff was not continued to be employed, or if some subsequent authority, the Quarter Sessions or the Commissioners in Lunacy did not approve? Are the defendants liable to an action for not employing him? The only answer given was that which applied to something very different from the case supposed, namely, the disapproval of the subsequent authorities, because that would be a thing not under the control of the defendants. But the approval by the defendants themselves is a thing in which their position would prevent them from being considered as the judges in their own cause. Now, when you consider what the nature of this committee really is, that amounted to no answer at all, because though the committee is in fact the organ of the county for entering into contracts and appointing the clerk in whose name they are to sue and be sued, they have no interest whatever in the question beyond what the county at large or the Commissioners in Lunacy, or the Secretary of State have. This, therefore, stands on precisely the same footing as the rest. It is just as reasonable that there should be a contract making the approval of the defendants the condition precedent, as the other way. It is a usual thing — indeed nothing is more common in this kind of labor, preparing plans, &c., than that they are not to be paid for unless they are approved; and that being a usual and not improbable thing, the question is, does the contract in its language show that that was the sort of contract entered into here? Now, I think that the words "requisite probationary drawings," for the approval, taken in connection with the state of legislation upon this subject, and that part of the contract which provides for the payment of 477*l.* upon the one event of the whole work having been done, taking into consideration also the whole contract, but particularly that part of it, it seems to me that the true construction of the words "for the approval of the committee" is, "such as the committee shall approve," and if they do not approve of them, then that the plaintiff's right to be further employed, or any right whatever that he had, ceased as soon as the committee thought fit not to go on employing him. They had the right to reject the plans, and acted upon that right, and the plaintiff has, therefore, no right of action whatever.

 Edwards v. Havell.

CRESSWELL, J. I am of the same opinion. It seems to me that the committee were not under any obligation to allow the plaintiff to go on with his work, he having failed to supply, within a reasonable time, probationary drawings for their approval, which I take it, meant "to be approved by them," because, by the statute, unless they did approve of them, they could not allow him lawfully to go on to earn the rest of the money by building a lunatic asylum. The 17th section itself contemplates that, for it says, that the visiting committee are to submit to the magistrates, at the Quarter Sessions, the plans that they have agreed upon — not the plans that have been furnished to them, but that they have agreed upon; and unless they had been agreed upon in the first instance they had no power to submit them to the Court of Quarter Sessions. I have no doubt that the meaning of the parties to this contract, made under that act of parliament, was, that he should furnish such plans as the committee approved of, and if he did not, they might dismiss him in a reasonable time.

TALFOURD, J. I have not heard the whole of the argument; but certainly there is nothing that I heard in the argument of the plaintiff's counsel that would lead me to form a different opinion from that at which the court have arrived.

Rule discharged.

EDWARDS v. HAVELL.¹

November 19, 1853.

Ship and Shipping — Master — Borrowing Money — Necessity — Charging Owner.

In an action for money lent, it appeared that the defendant, residing at Exeter, was owner of a ship, and that P., the master, being wind-bound in a river, at the distance of one day's post from Exeter, borrowed 5*l.* of the plaintiff, to buy provisions. The master was called as a witness, but was not asked whether he could have got the goods on the owner's credit: —

Held, that the jury were justified in inferring that there was such necessity for borrowing the 5*l.*, as to make the defendant liable.

THIS was an action for money lent, and on the other common money counts.

At the trial, before Talfourd, J., at the Bristol Summer Assizes, 1853, it appeared that the defendant, who resided at Exeter, was the owner of a vessel, of which Pearce was master; that the vessel, in the course of a voyage, was wind-bound in Newport river and that Pearce, being short of provisions, borrowed 5*l.* of the plaintiff, a

¹ 23 Law J. Rep. (N. S.) C. P. 8; 17 Jur. 1193.

broker in Newport, to replenish his stock. The course of post between Newport and Exeter was one day. The counsel for the defendant did not ask the master, who was called as a witness, whether he could have got the goods upon the defendant's credit. He submitted that the plaintiff was not entitled to recover, because no urgent necessity for borrowing the money had been made out. The jury found a verdict for the plaintiff for 5*l.* 2*s.* 6*d.*, the money lent and commission; the learned judge reserving leave to the defendant to move to set aside that verdict, and enter a verdict for himself.

Karlsruhe now moved accordingly. The well-established rule is, that the master of a vessel cannot make the owner liable for money borrowed, except it has been actually necessary, and here there was no urgent necessity made out in the evidence. The master might have communicated with the owner, or have got the articles on the credit of the owner.

JERVIS, C. J. I think that the rule on this subject has been rather qualified of late; and it is now said that the master may make the owner liable when borrowing the money is not absolutely but reasonably necessary.]

It is submitted that there was no evidence of such a necessity. The master did not show that he could not have got the things on the owner's credit, and did not, therefore, prove that cash payment was necessary. In *Beldon v. Campbell*, 6 Exch. Rep. 886; s. c. 6 Eng. Rep. 473, Parke, B., says, that the master has authority to borrow money only where ready money is necessary, and instances the cases of port and light dues, which must be paid in cash.

[MAULE, J. It may often be very much to the advantage of the owner that the money should be borrowed, so that the master might go into the market with the money in his hand, and get his provisions there, instead of going to a provision merchant, who, after having to inquire as to the credit of the owner, might charge a higher price. There is nothing in this case to show the goods might have been got without the money. The presumption is that they could not.

[JERVIS, C. J. You should have asked the master if he tried to get them on credit.

MAULE, J. The jury, probably, would have thought it unreasonable that the master should go into the town and get meat and vegetables and flour from the tradesmen on the owner's credit. If there had been evidence that the things could not be got on credit, it is clear that the master might have borrowed the money. Then, was it necessary that evidence should be given on that point? The jury did not want any evidence.]

In *Makintosh v. Mitcheson*, 4 Exch. Rep. 175, it was held that the onus lies on the plaintiff to prove that the money borrowed by a master was necessary, in order to render the owner liable.

[JERVIS, C. J. As to the master communicating with the owner, the ship was wind-bound, and it would not have done for him to wait

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till he could hear from the owner, or till the wind was fair to get the provisions on board.]

But if he could have got the goods on credit, he had no right to charge the owner for money borrowed.

JERVIS, C. J. From the way in which the defendant's counsel has put the case, the question is reduced to a single point. The point with respect to the ship being wind-bound, and the propriety of communicating with the owner, is not discussed. It is admitted that it was the master's duty to be provided so as to take the first opportunity, on the change of the wind, of proceeding on his voyage. The simple question is, whether it ought to have been shown that the master could not have got the provisions on the owner's credit. But I think that was sufficiently shown. The master proved that he got several articles, amounting together to 5*l.*, and the defendant's counsel did not ask him whether he could not have got credit for any of the provisions. But the jury must be taken to have considered that point, and to have thought he could not have got credit. In reality, no point of law arises in the case.

MAULE, J. I think that the jury may be taken to have inferred from their own knowledge of such transactions that, practically speaking, it was necessary for the master to go into the market with money in his hand. It may have been possible that he could have written to the owner to send him 5*l.*, but, though physically possible, it might have been commercially impossible.

WILLIAMS, J. I am of the same opinion. I think the statement of the defendant's counsel sufficiently shows a case of necessity.

TALFOURD, J., concurred.

Rule refused.

 COUNTY COURT APPEAL.

LEIDEMANN and others, *appellants*; SCHULTZ, *respondent*.¹

November 8, 1853.

Ship and Shipping — Charter-party — Term in, explained by Usage —
"Regular Turns of Loading."

The defendant chartered the plaintiff's vessel to proceed to Newcastle-on-Tyne, and there be ready forthwith "in regular turns of loading," to take on board by spout or keel, as directed, a complete cargo of four keels of coal, and the remainder coke. In an action for not loading the vessel with coke within a reasonable time:—

¹ 23 Law J. Rep. (N. S.) C. P. 17; 18 Jur. 42.

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Held, that evidence was admissible to explain the meaning of the expression in the charter-party, "in regular turns of loading," by showing that there was a usage of the port of Newcastle that vessels should take in their cargoes of coke in a certain regular order or turn; and that the question, whether the vessel was loaded within a reasonable time, ought not to be decided without reference to such usage, if proved.

AN action was brought by the respondent Schultz, in the County Court of New-castle-on-Tyne, to recover damages for the not loading, and for the detention for an unreasonable time, at Newcastle, of his ship, the Triton, which had been chartered by the defendant to take a cargo of coals and coke for him from that place. The charter-party, which was dated the 11th of January, 1853, stated that the Triton, then in London and ready to leave for the Tyne, shall "proceed to the river Tyne, and on arrival there be ready forthwith in regular turns of loading to take on board by spout or keel, as directed, not higher than Howdon, a full and complete cargo of four keels of coal, and the remainder coke." The Triton left London on the 19th of January, arrived at Newcastle on the 25th, and was entered on the 26th on the H H coal list for four keels of coal. On the 3d of February she was loaded with coal, and might have been so loaded on any day since the 20th of January, if the vessel had been ready for them. With regard to the coke, what took place was as follows: On the 14th of January Messrs. Leidemann caused the Triton's name to be entered in a book kept for the purpose of entering vessels to be loaded in turn at the S. and J. Drops, South Shields. On that spout there were, at the time the Triton was put on it, two other vessels, the Good Intent and the Fourteen, and had she been ready to take in her coal and coke earlier she might have been loaded at once, as the Fourteen was not ready to take her turn until the 3d of February. But having delayed taking in her coal till the 3d of February, she found when she went for her coke on that day that the Fourteen was then loading coke. Before that vessel had completed her loading the frost and snow commenced, and it was not until the 3d of March that her loading was finished, and the Triton was obliged to wait during that time, and could not get her cargo of coke on board before the 11th of that month. The vessel could have been loaded at another spout, but with coke at a higher price, and the defendant's offered to send her to that spout if the plaintiff would pay the difference in the price. No question was made about the coal: but the plaintiff contended that the Coal Act did not apply to the loading of coke; that it was not the custom of the port for vessels to wait their turn for loading coke; that they were only to wait a reasonable time; that the vessel was kept an unreasonable time, and could have been loaded earlier at another spout. The defendants contended that the charter-party provided that the vessels were to be loaded in the regular turn, and offered evidence to show that there was a custom of the port of Newcastle to enter a vessel, as soon as chartered, on a fitter's list for her turn of coke, and to load her with it in her turn. The county court judge rejected the evidence, saying that it was a question for the jury, whether the vessel had been loaded within a reasonable time; that the loading in regular turn was no answer to a claim for not loading in a reasonable time, and that in

his opinion the expression "taking on board coal and coke in regular turns of loading" in the charter-party, meant loading the coal first, and the coke afterwards. The jury found for the plaintiff.

Bovill, for the appellants. The Judge below put a wrong construction on the charter-party, and also improperly rejected the evidence of usage. By the local act to regulate the loading of ships with coals in the port of Newcastle-upon-Tyne, the 8 & 9 Vict. c. 73, the turns of loading vessels with coal on the Tyne are settled. These regulations, it is true, do not apply to loading coke. But there is a custom in the Tyne, which the defendant was prepared to prove as to the loading coke, and by that custom vessels are to load in regular order or turns. The judge rejected evidence of this custom, construing the expression "in regular turns of loading" to mean that coal was to be loaded first, and coke afterwards. According to law, evidence of usage or custom was clearly admissible to explain the meaning of that phrase, which has no precise meaning by itself. In *Robertson v. Jackson*, 2 Com. B. Rep. 412; (N. S.) C. P. 28, which is very similar in its facts, evidence was held admissible to explain the expression "in turns to deliver." *Syers v. Jonas*, 2 Exch. Rep. 111 and *Hutton v. Warren*, 1 Mee. & W. 466, illustrate the same rule.

Udall, for the respondent. It was the duty of the charterer to load the ship within a reasonable time if it could be done.

[JERVIS, C. J. If a man enters into a charter-party to load a cargo of coal, can you contend that he is bound to load it in a reasonable time, without reference to the custom of the port or the act of parliament?]

It is not necessary to go to that extent. The case shows that the defendants could have loaded the ship earlier, had the ship been allowed to go to another spout.

[JERVIS, C. J. Yes, but with different coke and at a higher price. If the captain may choose at what spout he will load, he may next choose what articles he will load with. It was not left to the jury to say, whether the charterer had sent the ship improperly to an incumbered spout.]

The Judge was right in his construction of the charter-party; there is nothing ambiguous in the words; and if he be right in that, the evidence rejected was inadmissible.

JERVIS, C. J. This is not an application to enter a nonsuit or verdict for the defendants, but simply for a new trial on the ground of misdirection and rejection of evidence. I am of opinion that the rule should be made absolute, and that the appeal should be allowed. The simple point is, whether the Judge was right in the construction which he put upon the charter-party, which led him to reject the parol evidence of the alleged custom. He has held the expression "in regular turns of loading" to mean that the coal was to be put on board first, and the coke afterwards, and to mean that only. In this, I think, he was wrong. If, indeed, the meaning which he

has put on the expression be correct, he was right in rejecting the evidence. But when it is known that there is an act of parliament regulating the turns of loading coal in the Tyne, and that there are a great number of vessels at Newcastle hurrying to take in their cargoes of coke, one would be led to think that there would be a practice as to the loading of vessels, and that the words "in regular turns of loading" would mean that turn which, according to the custom or practice of the place, the ship would be entitled to have. I think, evidence was admissible to explain the expression. We must assume for the purpose of this argument, that such a practice could have been proved, because by rejecting it the Judge has, in effect, decided that the custom has no bearing on the case, if made out. The case is very similar to that of *Robertson v. Jackson*, and other like cases, in which terms have by usage been engrafted upon contracts in some instances, though not expressed. Here, however, the term is expressed.

WILLIAMS, J. I am of the same opinion. The question is, whether the direction of the Judge below was correct, and whether he was right in rejecting the evidence of the custom. I think that he was wrong on both points. He directed the jury that the phrase "in regular turns of loading" meant that the coal was to be put on board first, and the coke afterwards. The evidence would, I think, have set him right on this point, and had he admitted it he probably would have directed the jury otherwise.

TALFOURD, J. I am of the same opinion. It seems to me that the expression "in regular turns of loading" has reference to something *dehors* the charter-party itself.

Bovill. The appellants should have their costs. It is the usual practice. Sometimes the successful party has the costs of the new trial, as well as of the appeal, taxed for him.

Udall. It is discretionary with the court to make an order as to costs. There is no regular practice. They are often refused. *Mountney v. Collier*, 2 El. & B. 100; s. c. 16 Eng. Rep. 323. At any rate, the costs of the appeal should abide the event of the new trial.

JERVIS, C. J. In *Gibbon v. Gibbon*, 22 Law J. Rep. (n. s.) C. P. 131; 20 Eng. Rep. 214, in this court last Hilary term, we at first ordered that the costs of the appeal should abide the event of the new trial, but after consulting my brother Parke and other judges, who told us that in the Exchequer the rule was, that the costs of the appeal should be given to the successful party, we altered our order accordingly in that case. We can only deal with the costs of the appeal. We cannot make the plaintiff, who succeeded below, pay the defendants the costs of the new trial. There is no injustice in saying, that if a party bring his appeal and succeed, he is entitled to his costs of appeal.

Appeal allowed, with costs.

Moorhouse v. Gilbertson.

MOORHOUSE, appellant; GILBERTSON, respondent.¹

November 17, 1853.

Parliament — County Vote — Forty Shilling Freehold — Tenant's Rates.

The appellant claimed to vote in respect of a freehold which he let for 40s. a year, he agreeing to pay the usual tenant's rates. If he had not so agreed, he could only have obtained 40s., minus the amount of those rates :—

Held, that the appellant had not an estate of the clear yearly value of 40s., and therefore that he was not entitled to vote.

CASE. At a court, held before the barrister appointed to revise the list of voters for the northern division of the county of Lancaster for the revision of the list of voters for the township of Preston, John Garlick, jun., duly objected to the name of Charles Edward Rawlins being retained on the said list. The facts of the case were as follows :— C. E. Rawlins and others were joint owners of freehold property in Preston; the property was let, and was rated to the poor and other usual tenant's rates, which included a water rate and local board of health rate. It was part of the terms of the letting that these rates should be paid by the owners, and they were so paid. If the owners had not agreed to pay the amount of those rates the rent obtained from the tenants would have been diminished by that amount. An agent had been appointed on the behalf of the owners, who managed the property, collected the rents, and, after paying all the necessary expenses incidental to the property, including the tenant's rates, divided the balance by the number of owners and transmitted to C. E. Rawlins and other persons interested the amount of their respective shares. After paying the other necessary expenses, but before paying the tenant's rates, the agent had each year a sum in hand which, if divided by the number of owners, would give 40s. clear as the share of C. E. Rawlins and the others respectively. After paying the tenant's rates the sum remaining in the agent's hand would, if divided by the number of owners, give as the share of C. E. Rawlins and the others respectively, a sum less than 40s. by precisely the amount of the rates, so that although the agent received from the tenants on account of each owner more than 40s. a year in the first instance, that sum underwent two reductions whilst still in his hands. In the first place, it was reduced to 40s. by the payment of expenses other than the tenant's rates; in the second place, it was reduced below 40s. by the payment of the tenant's rates themselves or any one of them, and the sum actually transmitted each year to C. E. Rawlins and to the other owners respectively, as their resulting share, was less than 40s. by the amount of the tenant's rates. Upon

¹ 23 Law J. Rep. (N. S.) C. P. 19; 17 Jur. 1184.

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this state of facts it was contended on behalf of the voter that inasmuch as the water rate and the local board of health rate were mere voluntary payments on the part of the owners, and inasmuch as by the statute 18 Geo. 2, c. 18, s. 6, the parochial rates were not to be deemed charges payable out of the property, that, therefore, neither the one or the other ought to be deducted in estimating its annual value. On behalf of the objector it was urged that though not charges payable out of the property, the parochial rates were, nevertheless, payments which diminished its annual value to the owners, and that the water rate and local board of health rate were not mere voluntary payments, but payments which the owners must of necessity make in order to procure from the tenants the stipulated amount of rent, and that therefore all these rates ought to be deducted. I decided that the annual value of the property in question to C. E. Rawlins and the other owners respectively did not amount to 40s.; that in estimating such annual value to C. E. Rawlins and the other owners respectively, there ought to be deducted under the circumstances the amount paid for the tenant's rates, including as before mentioned the parochial rates, the water rate and the local board of health rate, and that the real value of the property to the voter therefore was not 40s., but 40s. minus the amount paid for tenant's rates. I expunged the name from the list. The names of 104 other persons were also expunged from the list on the same ground, and their appeals were ordered to be consolidated.

Edward James, for the appellant. The decision of the revising barrister was wrong, as, in estimating the value of the freehold, he ought to have put out of consideration each one of the three rates mentioned in the case, namely, the parochial rate, the water rate, and the local board of health rate. The question depends upon the 18 Geo. 2, c. 18, ss. 5 and 6. The 5th section provides "that no person shall vote in any such election without having a freehold estate in the county for which he votes, of the clear yearly value of 40s., over and above all rents and charges payable out of or in respect of the same;" but by section 6, "no public or parliamentary tax, county, church, or parish rate, or duty, or any other tax, rate or assessment whatsoever, to be assessed or levied upon any county, division, rape, lathe, wapentake, ward, or hundred," is to be deemed or construed to be any charge payable out of or in respect of any freehold estate, within the meaning and intention of the act.

[JERVIS, C. J. The case does not find the value of the freehold. If the rent is the value, it finds that the tenants would have paid so much less rent if the landlord had not paid these rates.]

But by section 6 these rates are not to be deemed a charge payable out of the freehold.

[MAULE, J. That section means this, that you are not to consider any thing which the owner has to pay in respect of his enjoyment of that interest which confers the vote. As, for instance, suppose the landlord had to pay an income tax on the rent he received, that is not to be deducted. The legislature considers, that when he pays taxes,

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those taxes will be expended for his benefit; therefore, if out of his 40s. rent he pays 5s. taxes, he still dispend 40s., the 5s. which goes in taxes being dispended as much for his own benefit as the other 35s. may be in obtaining bread for his family.]

If the landlord were in the occupation of this freehold himself, the value to him would be 39s. plus 1s. poor-rate, but in that case the 1s. is not to be deducted. There is no difference between that case and this.

[MAULE, J. I agree in saying that these rates in that case ought not to be deducted; but before coming to the question, what is to be deducted, there must be 40s. from which to deduct. If the landlord occupied the freehold himself, the 1s. is part of what he dispend. But in this case the landlord does not get 40s., he only gets 39s.; therefore, it is unnecessary to consider what is to be deducted.]

The tenant, here, pays the rate for the landlord.

[WILLIAMS, J. Your argument must come to this, that if it were stated that the rent was 39s., but that it would be 40s. but for the rates, the landlord would be entitled to vote.

JERVIS, C. J. Which is as much as saying, that the higher the rates are the greater is the value.]

Byles, Sergt., for the respondent, was not heard.

JERVIS, C. J. The question is, what is the value of the freehold to the landlord? The value is 40s., if he is entitled to add to the rent the rates which are usually paid by the tenant, but it is not worth 40s. if he is not entitled to do that. I think, that in estimating the value, we must not include those rates, and then the value is not 40s. Before considering what are to be deemed charges payable out of the freehold, the freehold, as my brother Maule has shown, must be worth 40s., but the freehold here is not worth 40s., as the landlord gets only 39s.; therefore, the question does not arise what charges are to be deducted. Unless it can be said that a landlord who receives only 39s. rent, the tenant paying 1s., tenant's-rates, receives 40s., the claimant is not entitled to vote. It is quite clear to me that that cannot be said; and, therefore, the revising barrister was right, and his decision must be affirmed.

MAULE, J. I also think that the revising barrister was right. The question is not one of deduction of charges under the statute, but whether the sum out of which such deduction might have to be made amounts to 40s. I think that it does not. The interest of the claimant in the property may be taken to be represented by the rent, that is, 40s., subject not to any charge or tax upon it, but to an agreement on his part to pay rates, to which his tenant is legally liable. The claimant could only get 40s. for his land with this agreement, not 40s. for the land alone. I agree, that where the owner occupies his own land and pays poor-rates, such payment is not to be deducted from what he dispend, because it is only one mode of dispend; it is a portion of what he enjoys, and the legis-

Law v. Blackburn.

lature treats it just as if it was a payment for the support of his family. The appellant's counsel says, where is the difference between that case and this, where the owner pays the poor-rates out of the rent he receives? The difference is this: in the former case the payment by the owner is in respect of his own interest in the land. In the latter, he pays something which the tenant is liable to pay – something in respect of the tenant's interest in the land. The gross rent in the latter case is not the proper criterion of the value to the landlord, but the gross rent minus the amount which he has agreed to pay for the tenant, that is, which he has agreed not to receive. The case here is to be considered as if no such thing as a tax or rate existed; it is just as if the claimant, not being able to get 40s. for his land without some additional agreement to pay something for the tenant had let it for 40s., agreeing to pay the tolls which the tenant would have to pay every time he went to market; or as if, instead of agreeing to pay, as in this case, for the water the tenant might consume, he had agreed to pay for his beer, I think, therefore, that the revising barrister had no very difficult task to perform, and that he has performed it quite satisfactorily in deciding that the claimant is not entitled to vote.

WILLIAMS, J. I am of the same opinion. The appellant's counsel is driven to admit, if his argument is correct, that a person would have a good vote who could assert, not that his freehold was worth 40s. a year, but that it would be if it were not situate in a parish where the taxes were so heavy.

TALFOURD, J., concurred.

Appeal dismissed with costs.

LAW and others v. BLACKBURROW.¹

November 24, 1853.

Arbitration — Award — Construction — Informal Direction as to Entry of Verdict.

An action of ejectment (before the passing of the Common Law Procedure Act) upon the demise of A and the joint demise of B and C, was referred by a judge's order, after issue joined, to the award, final end, and determination of S., the costs of the cause and reference to abide the event. The arbitrator, after reciting the order of reference, awarded as follows: "I award and determine that the verdict in the said cause be entered for the lessors of the plaintiff": —

Held, per Maule, J., and Talfourd, J., (*dissentiente* Williams, J.,) in an action by the lessors of the plaintiff, against the defendant, to recover the costs, that the arbitrator having used words which had no technical meaning, must be understood to have finally determined the cause in favor of the lessors of the plaintiff.

¹ 23 Law J. Rep. (N. S.) C. P. 28; 18 Jur. 130.

DECLARATION, that the plaintiffs sued the defendants for 56*l.* 13*s.* 6*d.*, costs taxed and allowed to the plaintiffs, as the costs of an action of ejectment, and of the reference and award in respect of the same, and due and owing to the plaintiffs under and by virtue and in pursuance of the terms of a certain award made by one Jacob Player Sturge, upon and in respect of a certain submission made by the plaintiffs and the defendant, to the award, order, and determination of the said J. P. Sturge.

Plea — after reciting the declaration in ejectment, which was on the demise of James Thomas Law, and the joint demise of Henrietta Ross and Bridget Elizabeth James Ross, (the three plaintiffs in the present action,) and that the now defendant was the defendant, and pleaded the general issue, — that after issue joined thereon, and before any trial of the ejectment, the said submission in the declaration mentioned was made by an order of Patteson, J. [The order of reference was then set out, of which the following only are material parts:] “Upon hearing the attorneys on both sides, and by their consent, I do order that this cause be referred to the award, order, arbitration, final end and determination of J. P. Sturge, &c., so as he shall make and publish his award in writing of and concerning the matters referred, ready to be delivered to the said parties in difference, or to such of them as shall require the same, on or before the 10th of November next I further order that the costs of the said cause and the costs of the reference and award shall abide the event of the said award, . . . and that this order shall and may be made a rule of the Court of Common Pleas.” Then followed an averment that there never was “any other submission made by the plaintiffs and the defendant to the arbitration of J. P. S,” &c. The award was then set out, which, after reciting that an action had been lately commenced in the Court of Common Pleas, wherein John Doe, on the above demises, was plaintiff, and the present defendant defendant, recited the order of reference at length; and after reciting that the arbitrator had duly received all the evidence on either side, proceeded, “I do make and publish my award in writing of and concerning the matter to me referred as aforesaid, in manner following, that is to say, I do award, order, arbitrate, and determine that the verdict in the said cause shall be entered for the lessors of the plaintiff; and I declare that my costs of and attending the said reference, and of preparing and executing this my award, amount to the sum of 17*l.*”

Demurrer and joinder therein.

The plaintiff's points were, that the plea was no answer to the action; that the said award was valid; and that the plaintiffs were entitled to recover the taxed costs mentioned in the declaration.

The defendant's points were, that the arbitrator, in directing a verdict to be entered for the several lessors of the plaintiff, had exceeded the submission; that the award was not final, and was by such finding rendered uncertain, repugnant, defective, and void, and that no action lay upon it; and that the plea showed a good answer to the declaration.

Norman, for the plaintiffs. The award is valid, and the plea therefore bad. The arbitrator, in directing the verdict to be entered for the lessors of the plaintiff, must be taken to have decided generally in favor of their title and right of action; and in so doing he has not exceeded the power conferred on him. It is true that he was not authorized by the submission to enter a verdict; and it might be difficult to distinguish this case from some of the decisions, if he had ordered a verdict to be entered for the plaintiff; but the direction to enter a verdict for the lessors of the plaintiff is altogether informal, and the court, in endeavoring to ascertain the arbitrator's meaning, is not bound down by the use of technical terms, which have a peculiar signification, to interpret them in that and in no other sense, but is at liberty to infer what is meant, and will put such a meaning upon these words as will carry out the arbitrator's intention, and uphold the award. In *Jackson v. Clarke*, M'Cle. & Y. 200, the court was restrained by the arbitrator having used words which had a peculiar meaning, and could put no other upon them. The direction there was to enter a verdict for the plaintiff. That case is also distinguishable in this, that the cause referred was not at issue. The same may be said of *Hawkyard v. Stocks*, 2 Dowl. & L. P. C. 936. In *Donlan v. Brett*, 2 Ad. & E. 344, the cause was referred after issue joined; but granting that that case may decide that this award could not be enforced by attachment, it does not decide that an action will not lie to enforce it. *Edgell v. Dallimore*, 3 Bing. 634, is distinguishable on the same ground. In *Cock v. Gent*, 13 Mee. & W. 364, the Court of Exchequer intimated that, by directing a verdict to be entered, the arbitrator sufficiently indicated that he found that a cause of action existed to the amount for which the verdict was directed to be entered, and *Cartwright v. Blackworth*, 1 Dowl. P. C. 489, is cited. The principle to be applied here is, that an award is sufficient, if from it can be gathered by necessary intendment what the arbitrator's decision is. *Russell on Awards*, 354; *Humphreys v. Pearce*, 7 Exch. Rep. 696; s. c. 14 Eng. Rep. 495; *Howett v. Clements*, 1 Com. B. Rep. 128. And any clause involving an excess of authority may be rejected, and the award be valid, if enough remains to show the arbitrator's intention. *Doe d. Body v. Cox*, 4 Dowl. & L. P. C. 75. *Brooks v. Parsons*, 1 Ibid. 691, which would seem at variance with this, is overruled. But where the arbitrator had awarded a larger sum as damages than that already given by the jury, and there was nothing but that, which was an excess of authority and therefore to be rejected, to show what his decision was, it could not be treated as a valid award. *Hayward v. Phillips*, 6 Ad. & E. 119. Here the arbitrator has not exceeded his authority; he has decided informally, but intelligibly, in favor of one of the parties to the cause, and his award is therefore final and valid.

Field, for the defendant. The plea is good. The arbitrator, by directing a verdict to be entered has exceeded his authority. Rejecting, therefore, that clause, nothing remains to indicate his intention, and *Hayward v. Phillips* and those cases, which show that no action can be maintained on an award when the only clause amounting to

an award is an excess of authority, apply. *Bonner v. Charlton*, 5 East, 139; *Hawkyard v. Stocks*. It is clear that the arbitrator, under this submission, had no authority to order a verdict to be entered. *Hutchinson v. Blackwell*, 8 Bing. 331, in which case the court decided that the arbitrator cannot direct a verdict to be entered, although the cause and the issue therein be referred. *Cartwright v. Blackworth* is overruled by *Donlan v. Brett*, where Lord Denman, C. J., is reported to have said that Littledale, J., had informed the court that he would not have so decided *Cartwright v. Blackworth* if he had known of the decision in *Jackson v. Clarke*. Even assuming this award to be a decision in favor of the lessors of the plaintiff generally, still as there are two distinct demises it is uncertain; for who is to have the land? The award therefore is, at all events, bad for uncertainty.

Norman, in reply.

MAULE, J. I am of opinion that the plaintiffs are entitled to judgment. There are decided cases which approach the present in their circumstances, but none so precisely in point as to interfere with or govern our present decision. It is quite clear that the arbitrator intended to determine and did, in his own opinion, determine the matters referred to him, when he used the terms which have been the occasion of bringing the case before the court. On the merits, then, it is clear enough that the questions before the arbitrator had been finally decided, and that the plaintiffs and the defendant knew what his decision substantially was. Still the cases show that any objection of form, which cannot be got over, entitled the defendant to take advantage of it as a defence in an action on the award; and although it is manifest in the present case for which party the arbitrator intended to give his decision, yet if the cases show that the award is nevertheless void, the defendant will be entitled to our judgment. In all the cases cited which bear on the point, the verdict had been directed to be entered for the plaintiff; and the arbitrator had used precise technical terms, the meaning of which was clear and intelligible. If the arbitrator in those cases had simply meant to decide that the plaintiff was entitled to succeed in the action, he would have expressed it as he did, and it would have been done by entering a verdict; and all the cases turned upon the point of the arbitrator having exceeded his authority in making an order to enter a verdict — a thing which might have been done, but which was not authorized by the submission to be done.

But it is said that a direction to enter a verdict shows that the arbitrator decided that the plaintiff had a cause of action. It shows it no further, in my opinion, than this: that the arbitrator thought the plaintiff had a cause of action, so far as being entitled to have a verdict found for him, but not as to any substantial fruits of such a verdict. It may well enough be that circumstances may be proved by which the arbitrator may feel himself bound to find a verdict for the plaintiff, though in fact the plaintiff may not be entitled to recover. In each of the cases cited, the court had to deal with the

strictly technical and appropriate expression, "entering a verdict for the plaintiff," an expression having its own precise meaning, and, generally speaking, those cases were cases of reference after issue joined. Now here there is a material difference, though of a verbal nature only. The arbitrator here has not adopted the strictly technical and appropriate expression as to entering a verdict. He has directed a verdict to be entered for the lessors of the plaintiff: that he had not, and no person has, the power to do. Technically speaking, the lessors of the plaintiff are quite strangers to the action; and the case must be treated as if the arbitrator had not used any thing approaching a formal expression. It certainly is one neither legal nor technical, inasmuch as what he has directed to be done cannot be done. But though the expression used may have no legal nor technical meaning in its precise terms, it by no means follows that it must be treated as absolute nonsense; on the contrary, it may be read in an ordinary and popular sense with reference to the subject-matter as to which it is used.

On the present occasion, when the arbitrator directs "a verdict to be entered for the lessors of the plaintiff," he says, in effect, that the lessors of the plaintiff are entitled to recover the land, the subject-matter of the action; and though the words used are very inaccurate, they cannot be treated as nonsensical or having no meaning at all: and taking the circumstances of the cause and the terms of the submission into consideration, the only meaning they can have is, that the lessors of the plaintiff, the persons substantially interested in the cause, are entitled to the property claimed. Any one sitting anywhere but in a court of justice, and interpreting any thing but an award, would so interpret the expressions used. The arbitrator, therefore, in language not susceptible of any other reasonable meaning, and not having any precise technical meaning, has shown that he decides the matter submitted to him in favor of the parties who are the lessors of the plaintiff. If he has expressed that meaning in any sufficient language, that is enough; there is no rule as to how in such a case he should express his meaning. He might have said, "I decide in favor of the plaintiff," or "my opinion is in favor of the plaintiff." A verdict in this case could not be entered as directed, nor for the plaintiff; and the words used would be, therefore, meaningless if taken in their precise terms, and inoperative if taken as directing a verdict for the plaintiff. I think, therefore, they must be taken as giving expression to a general direction on the part of the arbitrator in favor of the lessors of the plaintiff; and if this meaning can be gleaned, they are as effectual as an expression of his decision as if he had used language of the strictest and most precise nature. Then, as to there being two counts; for the reasons I have given, it seems to me that the plaintiffs have a right to say, that this award sufficiently shows that the arbitrator has done what he had power to do, and no more, namely, to decide that the lessors of the plaintiff are to succeed throughout the whole action: that the matters put in issue and referred to the arbitrator are to be determined in their favor. There must, therefore, on the whole, be judgment for the plaintiffs.

WILLIAMS, J. I have very many reasons for wishing to be able to agree with my brother Maule; but I regret to say I cannot agree, because I consider we are bound by the decided cases. No doubt, many cases which were cited in the argument are distinguishable from the present: such cases as those where the arbitrator had power to find a verdict and did so find; and where it was held, on motion for an attachment, that a verdict so found was no ground for an attachment issuing, on the principle that the finding of a verdict did not amount to an order to pay, and that therefore there was no disobedience or contempt of court in not paying. But the case of *Jackson v. Clarke*, recognized as it was in subsequent cases, is expressly in point, as it appears to me; and I have been unable to distinguish it from the present. Certainly, if I had been called upon to decide that case when it was before the Court of Exchequer, I should have come to a different conclusion. I should have said that the arbitrator there had no authority to enter a verdict, and that therefore his finding was a nullity so far; but that, inasmuch as it showed his intention, it might operate as an award though not as a verdict, and as an award might be the subject and foundation of an action; but the Court of Exchequer held that no action would lie. I think that decision was erroneous; but, nevertheless, I do not think we should be justified in the present case in overruling decided cases, more especially as the point is on the record, and the parties can therefore have their writ of error; and to that, I think, we ought to leave them, if they wish to have former decisions reversed. I am unable to distinguish the present case on the ground put by my brother Maule. It seems to me, if the arbitrator, having no power to direct a verdict, has ordered that a verdict should be entered, that is an excess of jurisdiction; and if that is expunged, as it must be according to the decided cases, there is nothing left on which to found an action. I think, therefore, that the plea ought to be held good, and that judgment should be for the defendant.

TALFOURD, J. I agree with my brother Maule in thinking that the plaintiffs are entitled to judgment. This was the case of an action of ejectment referred to a lay arbitrator, the costs of the cause to abide the event. Now, I think no one would doubt that the arbitrator came to a decision in favor of the title of the lessors of the plaintiff, and that he intended to express that decision; nor do I think that we are, by any technical sense, precluded from giving the plain meaning to the words which they evidently have, as indicative of the intention of an unenlightened and unprofessional person. Many cases were cited in the course of the argument which have little, if any, bearing on the present case. The cases as to attachment are altogether inapplicable here; they only show that the courts will not hold parties in contempt by mere implication; and if an arbitrator has abstained from giving a decided direction, the courts refuse to enforce any implied direction by attachment. The other class of cases cited are those in which the arbitrator had no power conferred on him to direct as he had done, and on which the court cannot act. Each of

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the classes seem inapplicable here. *Jackson v. Clarke* and *Hayward v. Phillips* are distinguishable on the principle pointed out by my brother Maule. In those cases there was an assumption by the arbitrator of a power, which had not been granted to him, to do something which was left to him; but he only assumed to do something which might have been done had the power been given him. Here the arbitrator has assumed to do something which cannot be done under any circumstances; and the words used therefore have no particular technical meaning, and we are left to interpret them as indicative merely of the intention of the arbitrator to decide the matters referred to him in favor of the lessors of the plaintiff. I agree, therefore, with my brother Maule, in holding that the plaintiffs are entitled to the judgment of the court; and I am happy to think that in so holding we are acting according to the justice of the case and in accordance with the manifest intention of the arbitrator.

Judgment for the plaintiffs.

BERRY v. ALDERMAN.¹

November 5, 1853.

Bill of Exchange — Indorsee against Acceptor — Accommodation Bill — Fraud — Bonâ Fide Holder for Value — Onus of Proof.

Action on a bill of exchange drawn by M. upon, and accepted by, the defendant, indorsed by M. to H., and by H. to the plaintiff. First plea, that the bill was accepted by the defendant, and drawn and indorsed in blank by M. without value; that the defendant gave it to E. to get it discounted for the defendant; that E. did not get it discounted, but, in fraud of the defendant, and without the consent of M., delivered it to some person unknown; and that neither H. nor the plaintiff gave value for the indorsements to them respectively. Second plea, the same as the first, except that, instead of alleging want of consideration by H. and the plaintiff, it alleged that H. and the plaintiff respectively had notice that the bill had been obtained from the defendant, by fraud. On the part of the defendant, evidence was given that E. had obtained possession of the bill by fraud, upon which the judge ruled that the *onus* was cast upon the plaintiff of proving that he gave value: —

Held, that this ruling was correct.

DECLARATION on a bill of exchange, dated the 7th of September, 1852, for 30*l.* at three months, drawn by one Meyer upon and accepted by the defendant, and indorsed by Meyer to Halliday, and by Halliday to the plaintiff.

The defendant pleaded, first, that there never was any value or consideration whatever for the acceptance of the bill by the defendant, or for the drawing or indorsement by Meyer, and that the indorsement by Meyer was an indorsement in blank; and that after

¹ 23 Law J. Rep. (N. S.) C. P. 34; 2 Common Law Rep. 690.

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the bill was drawn and accepted by the defendant, the defendant gave it to one Edwards for the special purpose of getting it discounted, and paying over the money to be received for such discounting to the defendant, and for no other purpose whatever; and that Edwards did not get the bill discounted or pay over any such money to him, but in fraud of the defendant, and contrary to the said special purpose, and without the consent of the defendant or Meyer, delivered the bill to some person to the defendant unknown; and that Halliday never gave, and always held the bill without any value or consideration for the indorsement to him; and that there never was any value or consideration whatsoever for the indorsement to the plaintiff, who always held, and now holds, the bill without any value or consideration whatever. Secondly, that there never was any value or consideration whatsoever for the acceptance of the bill by the defendant, or for the drawing or indorsement by Meyer; and that the indorsement by Meyer was an indorsement in blank, and that after the bill was drawn and accepted as aforesaid, the defendant gave the same to one Edwards for the special purpose of getting the same discounted for the defendant, and paying over the money to be received for such discounting to the defendant, and for no other purpose whatever; and that Edwards did not get the bill discounted or pay over any such money to the defendant, but in fraud of the defendant, and contrary to the said special purpose and without consent of the defendant or Meyer, delivered the bill to some person to the defendant unknown; and that Halliday before and at the time of the indorsement to him had notice of the bill having been obtained from the defendant by fraud; and that the plaintiff before and at the time of the indorsement to him had notice that the bill had been obtained from the defendant by fraud. Issues thereon.

At the trial, before Talfourd, J., at the sittings for Middlesex after last Trinity term, the plaintiff having proved the acceptance and the indorsements on the bill, the defendant in support of his pleas proved that the bill was drawn and accepted for his accommodation, and that he had given it to Edwards to get it discounted for him, and that Edwards had never returned him either the bill or the money. The learned judge upon this ruled, that the plaintiff was bound to prove that he gave consideration for the bill; and the plaintiff accordingly having given evidence for that purpose, the learned judge left three questions to the jury; first, whether Edwards obtained the bill from the defendant by predesigned fraud; secondly, whether the plaintiff had given consideration for the bill; and, thirdly, whether he was cognizant of the fraud. The jury having answered the first and third questions in the affirmative, and the second in the negative, the verdict was entered for the defendant, and leave was reserved to the plaintiff to move to enter the verdict for him, if the court should be of opinion that the judge was wrong, at the close of the defendant's evidence, in calling upon the plaintiff to prove consideration.

Shee, Sergt., now moved accordingly. It is submitted that the pleas were not proved, and that the judge at the close of the defend-

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ant's case ought to have directed the jury to find for the plaintiff. The defendant only proved that the bill was drawn and accepted for his accommodation, and that he gave it to Edwards to get it discounted, and that Edwards did not give him the proceeds. It was not proved that Edwards obtained the bill by fraud, nor that he did not get it discounted; all that was shown was, that he was guilty of a breach of trust after he had received the bill.

[TALFOURD, J. It was allowed throughout the case that the defendant had been swindled out of either the bill or the money. I considered there was evidence, and the jury found that Edwards had obtained the bill by fraud.]

WILLIAMS, J. That being so, *Harvey v. Towers*, 6 Exch. Rep. 656; s. c. 4 Eng. Rep. 531, shows, that where a bill has been obtained by fraud, the holder is bound to prove that he gave value for it, and that the judge is right to call upon the holder for that proof if there be evidence of fraud for the jury.]

In that case the plea alleged that the bill had been obtained by fraud, but neither plea in this case contains that allegation. So also in *Baily v. Bidwell*, 13 Mee. & W. 73, cited at the trial, the plea alleged that the note was illegal in its inception; and Alderson, B., in delivering judgment says, that illegality and want of consideration must both be averred.

[MAULE, J. Alderson, B., relies not on the presence or the absence of the allegation of fraud, but on this, that the proof of illegality requires counterproof of consideration. The value of the plea does not alter the evidence required. Suppose no fraud is alleged, but that the issue is, consideration or no consideration. If the defendant proves fraud or illegality the plaintiff is bound to prove consideration. A bill is always presumed to have been given for a good consideration, but as soon as fraud is proved a contrary presumption arises.]

Smith v. Braine, 16 Q. B. Rep. 244; s. c. 3 Eng. Rep. 379, was also referred to.

JERVIS, C. J. I am of opinion that my brother Talfourd was quite right in the course he took at *Nisi Prius*, and that there ought to be no rule. There was evidence, and the jury found, that Edwards had swindled the defendant out of the bill; the plaintiff was therefore bound, as the cases show, to prove that he was a *bond fide* indorsee for value, and he failed to do so.

• MAULE, J., WILLIAMS, J., and TALFOURD, J., concurred.

Rule refused.

Morgan v. Couchman.

MORGAN v. COUCHMAN.¹

November 16, 1853.

Evidence — Payment — Principal and Factor — Estoppel — Affidavit — Inference of Law — Practice — New Trial — Point Reserved.

In an action for goods sold, there was a plea of payment, and it appeared that both the plaintiff and the defendant employed G. as factor. G. sold the goods to the defendant knowing he was factor. On a balance of accounts, G. was indebted to the defendant. The plaintiff, who knew the state of accounts between G. and the defendant, petitioned the Court of Bankruptcy to make G. bankrupt, and alleged in his affidavit that G. owed him a sum of money for goods sold by G. as factor of the plaintiff, to the defendant, and for which he had received payment by means of goods sold by the defendant to G. The plaintiff having afterwards sued the defendant for the price of the goods : —

Held, that the statement in the affidavit was not conclusive evidence estopping the plaintiff from denying that the defendant had paid for the goods ; the allegation as to payment, so explained, not being an allegation of fact, but of an inference of law drawn by the plaintiff.

Where counsel at a trial does not ask that a certain point should be submitted to the jury, but gets leave to move reserved, he cannot afterwards ask for a new trial, on the ground that that point was not submitted to the jury.

ACTION for 95*l.* 19*s.* for goods sold, &c.

Pleas — first, never indebted ; secondly, payment.

The cause was tried, at the Surrey Summer Assizes, *coram* Channell, Sergt. It appeared that the plaintiff was a farmer and a cheese-dealer, and that he was in the habit of sending goods to Golden, a cheese-factor in London, for sale. The defendant was also a cheese-monger, and in the habit of sending goods to Golden on sale and account. The goods for which the action was brought were purchased by the defendant of Golden, and the invoices were delivered in Golden's own name. During the period when the goods were supplied to the defendant, Golden sold goods for the defendant ; and upon a balance of accounts, Golden was indebted to the defendant. The plaintiff proved that at one part of the time his name was on Golden's doorpost, and there was other evidence to show that the defendant knew Golden was only factor. The goods were supplied in January and May, 1853 ; and afterwards the plaintiff knowing at the time the state of accounts between Golden and the defendant, petitioned the Court of Bankruptcy to make Golden a bankrupt, and in the affidavit on which the petition was founded, he claimed from Golden a debt of 70*l.* 5*s.* 8*d.*, which he described as being "for goods belonging to this deponent sold and delivered by William Golden as the factor or agent of the deponent, to Stephen Couchman, (the defendant,) and for which goods the said William Golden received payment by means of goods sold and delivered by Couchman to Golden, and which goods were used by Golden in the trade of a

¹ 23 Law J. Rep. (N. S.) C. P. 36.

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cheesemonger." It was contended for the defendant that this evidence proved the plea of payment, and that the plaintiff was, by the terms of his affidavit, estopped from denying that he had been paid for the goods. By arrangement, a verdict was given for the plaintiff for 95l. 19s., leave being reserved to the defendant to move to enter a nonsuit, or a verdict upon the issue on the plea of payment, or to reduce the amount to be recovered by 70l. 5s. 8d. if the court should be of opinion that the effect of the affidavit entitled the defendant to do so.

A rule *nisi* having been obtained to that effect, or for a new trial on the ground of misdirection, —

November 16, *Montague Chambers* and *Hawkins*, showed cause. There was no evidence to go to the jury in support of the plea of payment. The principal question turns upon the affidavit made by the plaintiff in the Court of Bankruptcy. It is said that as the plaintiff in his affidavit treated Golden as his debtor, and averred that Golden had received payment for the goods in question from the defendant, he is now estopped from charging the defendant, and denying the payment by him. But the affidavit cannot surely have that operation. If there had been no bankruptcy, the plaintiff could clearly have sued the defendant. If he had sued the factor, and gone on to judgment, he would not have been precluded from suing the party who was really indebted. It may be that he was right in swearing that Golden was justly and truly indebted to him, and yet he may not be precluded from suing the defendant. The plaintiff, when he made the affidavit, may have been laboring under a mistake as to his legal rights. The first question that arises on the affidavit is, whether it appears that the defendant paid Golden. That is not sufficiently proved, and even if it were, it would not necessarily amount to a payment to the plaintiff.

[MAULE, J. It may be said that the plaintiff, in the affidavit, conclusively adopts the payment, if any payment actually did take place. There is some evidence, but by no means conclusive evidence. If I had had to deal with the whole matter, I should have thrown the affidavit overboard altogether. The plaintiff might be mistaken as to his rights. He might try by the affidavit whether he was right, and if the commissioner should be of opinion that he was right, then he might adopt another course. If the plaintiff was wrong, or perjured himself, no damage could have resulted to the defendant. To make the facts enure as payment, the defendant must have had a transaction with Golden, which amounted to payment by the defendant to the plaintiff, either authorized before, or afterwards ratified, by the plaintiff.]

Even if the affidavit proves ratification by the plaintiff, the transaction of payment itself is not shown. At all events, there is only some evidence of it, but not any evidence that is conclusive.

[MAULE, J. The case bears an analogy to those in which payment has been made to an attorney who has sued without the authority of the plaintiff. There the court does not interfere if the attorney be solvent; but if he be insolvent, the payment to him is no discharge.

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It is not unlike the case where the servant, without any authority, receives money due to his master. There the master may take the money from the servant if he pleases; but he surely might sue the debtor if he chose.]

It is not open now to the defendant to contend, that though the evidence be not conclusive, there was some evidence to go to the jury, and that, therefore, there should be a new trial.

Lush and *T. Chambers*, in support of the rule. It was misdirection not to leave the evidence of payment to the jury.

[*WILLIAMS, J.* When the defendant took the benefit of having the point reserved in his favor, did he not waive the question of fact?

JERVIS, C. J. The defendant, in substance, said, "If you give me leave to move, I agree that the question shall be treated as one of law."]

Can it be said that a party is precluded from asking for a new trial when a point is reserved?

[*MAULE, J.* If counsel at the trial keeps back a point on which he is certain he will have a decision against him, and then takes leave to move, he cannot afterwards insist upon his right to a new trial, because the question which he kept back was not left to the jury.]

If the contents of the affidavit are, technically, evidence under the plea of payment, the defendant is entitled to the benefit of the plea, and to reduce the verdict by the sum mentioned in the rule. And it is submitted, that the plaintiff having himself treated the transaction as a payment, cannot now deny that such payment was made.

MAULE, J. I think this rule must be discharged. The question in the case has arisen in this way: whether there was any evidence that the money claimed or any part of it had been paid. What is suggested as evidence of that is the transaction between the defendant and Golden. But that transaction of itself cannot be treated as payment. The case turns upon the statements in the affidavit, upon which so great a stress is laid, as a sort of estoppel. It is an affidavit in which the plaintiff speaks of the money in question in a proceeding against Golden in the Court of Bankruptcy. He does not state simply, and expressly, and absolutely, that the money was paid by any body to Golden for the plaintiff; but he says that there was payment, and then states what he considers as payment. He says that Golden is indebted to him in 70*l.* 5*s.* 8*d.* for goods sold by Golden as his factor to the defendant, and for which Golden received payment by means of goods sold and delivered by Couchman to Golden, and which Golden used in the course of his business as a cheesemonger. Now, a sale and delivery of goods by the defendant to Golden, which goods are afterwards employed by Golden in the course of his business, certainly does not amount to payment of a debt due from the defendant to the plaintiff, and the fact of the plaintiff's anxiety to treat it as such does not make it any more so. If the facts detailed do not show that the transaction amounted to payment, then the plaintiff's calling it payment will not make it so, or restrict

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the language to the same sense as if he had sworn absolutely that there was payment. The facts being stated, the conclusion that they operated as payment is mere inference of law. It cannot be said that the plaintiff was swearing implicitly to some other matter of fact which would make the whole amount to payment. You cannot in such a case supply any fact. There would be no perjury by the plaintiff if the affidavit were true, striking out the word payment. It does not appear that there was any agreement that any thing which took place between Golden and the defendant should enure as a payment and I do not think the facts show any thing from which a jury could find the fact of payment. I should have said if the jury had found there was a payment they were wrong, and their verdict ought to be set aside.

JERVIS, C. J., concurred.¹

WILLIAMS, J. I am of the same opinion. The affidavit does not in itself contain any facts which would constitute payment in point of law. It also appeared that the evidence, independent of the affidavit, was not such that the defendants could have asked the jury for their verdict. It was contended for the defendant that the plaintiff was estopped from contesting the fact. The judge said he considered that a point of law, and reserved it, and it is decided against the defendant. But it is now said for the defendant that there was a scintilla of evidence, and that he might have gone to the jury upon it. But that was not insisted on at the trial. If there had been a scintilla of evidence, a verdict upon it would have been very unsatisfactory. But where counsel takes the course which was taken here at the trial, he ought not to fall back on a point like this.

TALFOURD, J. I am entirely of the same opinion. I do not think that this is a case where some question of fact escaped the attention of counsel. The intention must have been that the case should turn upon the effect of the affidavit. That must have been the meaning of the agreement at *Nisi Prius*.

Rule discharged.

¹ His lordship was out of court at the conclusion of the argument.

*Cooper v. Parker.***COOPER v. PARKER.¹**

November 3, 1853.

Contract — Consideration — Acceptance of Less Sum in Satisfaction of Greater — Pleading.

To a declaration for work and labor, the defendant pleaded, that after the present cause of action, and before suit, the plaintiff levied a plaint against the defendant in the county court for 50*l.*, that the defendant being then and at the time of the accruing of the cause of action for which the plaint was levied, an infant, gave notice that he should defend himself against the plaint on that ground, and that before trial in the county court, the plaintiff and defendant agreed that the defendant should pay the plaintiff's costs and 30*l.*, and that the plaintiff should accept the 30*l.* and the performance by the defendant of the agreement in satisfaction as well of the cause of action for which the plaint was levied, as of all causes of action which the plaintiff then had against the defendant. Averment of payment before suit by the defendant of the 30*l.* and costs, and acceptance by the plaintiff in pursuance of the agreement : —

Held, that the averment of the defendant being an infant when the cause of action arose for which the plaint was levied, was immaterial, and that the plea was a good defence without that averment.

THE declaration was for work and labor by the plaintiff as solicitor to the defendant, for money lent, money paid, and money due upon an account stated.

The defendant pleaded, first, never indebted; secondly, payment; thirdly, the Statute of Limitations; fourthly, infancy; fifthly, that after the accruing of the supposed causes of action in the declaration mentioned, and whilst the same were subsisting, and before the commencement of this suit, the plaintiff levied his plaint against the defendant in the County Court of Cheshire, holden at Congleton, then having jurisdiction in that behalf, to recover the sum of 50*l.* then claimed by the plaintiff to be due from the defendant to the plaintiff, to wit, for money lent and money paid by the plaintiff for the use of the defendant at his request, and for interest thereon from the 14th day of May, A. D. 1846, and also to recover the same on account stated; that the defendant then defended himself against the said plaint, and being then and at the time of the accruing of the said supposed causes of action for which the said plaint was levied as aforesaid, an infant under the age of twenty-one years, gave due notice in the said suit in the said county court that he should defend himself against the said plaint on the ground of infancy. And thereupon and before any trial had of the said suit in the said county court, and before the commencement of this suit, it was agreed by and between the plaintiff and the defendant that the defendant should pay to the plaintiff the sum of 30*l.*, and that the defendant should pay the costs of the plaintiff by him incurred in the said plaint, and that the defendant should make such last-mentioned payments respectively,

¹ 23 Law J. Rep. (N. S.) C. P. 41 .

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and the plaintiff should accept and receive the said sum of 30*l.*, and the performance by the defendant of the agreement in this plea mentioned respectively in full satisfaction and discharge as well of the supposed causes of action for which the said plaintiff was so levied as aforesaid, as of all causes of action whatsoever which the plaintiff then had against the defendant; and that afterwards and before this suit, in pursuance and performance of the said agreement in this plea mentioned, he, the defendant, then paid to the plaintiff the said sum of 30*l.*, and then paid the costs of the plaintiff by him incurred in the said plaintiff; and the plaintiff then accepted and received from the defendant the said sum of 30*l.*, and the performance by the defendant of the agreement in this plea mentioned respectively, in full satisfaction and discharge as well of the supposed causes of action for which the said plaintiff was levied as aforesaid, as of all causes of action whatsoever which the plaintiff then had against the defendant.

To the fourth plea the plaintiff replied that the work and labor were necessary and suitable to the then estate of the defendant, and that the money paid and advanced was for necessaries; and he joined issue on the first, second, third, and fifth pleas, and also on the fourth so far as the same related to the claim for money lent and money due upon an account stated.

The action was tried, before Lord Campbell, C. J., at the last Spring Assizes at Chester. The defendant offered no evidence in support of the first four pleas, and the plaintiff had a verdict on them; and, as to the fifth plea, the learned judge directed the jury to find for the defendant if they were of opinion that the plaintiff had accepted the sum of 30*l.* and the performance of the agreement therein mentioned in discharge, not only of the claim in the county court, but of all causes of action then subsisting between the parties. The jury, being of that opinion, returned a verdict for the defendant accordingly.

Miller, Sergt., now moved for a new trial on the ground of misdirection, or for judgment for the plaintiff on the fifth issue, *non obstante veredicto*. The fifth plea would have been bad without the allegation that the defendant was an infant when he was sued in the county court; the learned judge ought, therefore, to have told the jury that, if they found that he was not an infant then, their verdict should be for the plaintiff. But the jury have, in fact, so found, for they have found the fourth issue in favor of the plaintiff, that is, that the defendant was not an infant when the present cause of action accrued; and that involves the finding that he was not an infant when he was sued in the county court, because, at that time, the present cause of action was subsisting. That being so, the acceptance of 30*l.* could not be a satisfaction for a debt of 50*l.*, and it was necessary to prove some consideration for the relinquishment of the residue. *Cumber v. Wane*, 1 Smith's Lead. Cas. 146. The withdrawal of a false plea is no consideration.

[MAULE, J. Surely it was some advantage to the plaintiff to have the plea withdrawn and the suit concluded, and it was done. The extent of the advantage we cannot inquire into. Suppose A says to

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B, "I will give you 20*l*. to withdraw a bill now before parliament." If B withdraws the bill, is not that a sufficient consideration for A's promise?]

If an action has been unjustly brought, the staying of it is no consideration for a promise. Why, then, should the withdrawing of a false plea? It can be no detriment to the defendant, because he must fail; and it can be no benefit to the plaintiff, because he must succeed.

[JERVIS, C. J. The record does not show that the defendant was not an infant when the cause of action for which he was sued in the county court arose. He might have been an infant at that time, though not an infant when he was sued.]

Still the point arises, whether the judge ought to have left that question to the jury.

JERVIS, C. J. The question is, whether the averment in the fifth plea, that the defendant was an infant at the time of the accruing of the cause of action for which the plaint was levied is material. I do not think it is, because the agreement, as stated in the plea, is a good defence to the action, whether he was or was not. There will therefore, be no rule.

MAULE, J., WILLIAMS, J., and TALFORD, J., *concur*.

Rule refused.

WESTBROOK v. THE AUSTRALIAN ROYAL MAIL STEAM NAVIGATION COMPANY. OTHERS v. THE SAME.

November 2, 1853.

Practice — Consolidating Actions.

Where eight passengers in a ship signed a joint writ and supported the same motion to bring separate actions against the owner for damages arising out of a wreck of a vessel.

It is well settled on both sides of the Atlantic, that the assignment of a writ or, from his defence, of part only of an assigned sum due from the defendant, the creditor's claim for the balance of the debt remains in force, and the creditor requires no more evidence of recovery from such part payment. But if the creditor assigns the whole of the balance, he cannot, in such case, sue for the balance, as the debt is deemed to be paid. But if the creditor assigns a part only of the debt, he may sue for the balance, as the debt is deemed to be unpaid.

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for the passage, whereby the plaintiffs suffered in their health, the court refused a rule to stay proceedings in seven of the actions till one should be tried, although the defendants offered to undertake not to defend the others, if there should be a verdict found against them on such trial.

THESE were eight actions, in each of which the plaintiff complained that the defendants undertook, in consideration of certain passage-money paid by the plaintiff, to supply the plaintiff with a second-class passage from Melbourne in Australia, to England, and with provisions and other requisites according to that class, in their ship, the Melbourne; but that the defendants, neglecting their duty, did not provide him with a second-class passage or provisions and requisites according to that class, but with a third-class passage, and with bad and insufficient provisions and accommodation, whereby his health was injured, &c.

Lush now moved for a rule to stay proceedings in seven of these actions until one of them should have been tried, offering to undertake that the defendants should not defend the other actions if there should be a verdict against them in this one. It appeared on affidavit that these actions were brought under the same circumstances, on behalf of the eight plaintiffs, who were fellow-passengers on the voyage, and signed a round robin, and employed the same attorney.

[MAULE, J. They would get only nominal damages for the breach of contract; but they complain of suffering in their health. They have different grievances. Mr. Smith could not be said to have suffered in Mr. Brown's health.]

Per Curiam.

Rule refused.

CANNAN and others, assignees of HUTCHINGS, a bankrupt, v. FOWLER¹

November 25, 1853.

Contract, Construction of.

In March, 1853, H., by parol, sold goods to the defendant, at an agreed price, and the defendant then took possession. In the following May, by articles of agreement, it was agreed between them as follows: "That H. shall sell, and the defendant shall purchase (the same goods,) and that the price to be paid for the same shall be the fair amount of the value thereof, such amount to be settled, in case the parties shall differ as to the same, by arbitration in manner hereinafter mentioned, and that the defendant shall pay to H. the amount of such price within two calendar months after such price shall have been fixed as aforesaid." The defendant continued in possession of the goods, and never objected to the price originally fixed. H. having become bankrupt in August, his assignees, in November, sued the defendant for the amount, as for goods sold and delivered:—

Held, that in the absence of evidence that the parties had differed since March as to the amount then fixed, it was not shown that the event upon which the arbitration clause was to apply, had ever arisen, and that the fair value mentioned in the agreement must be taken to be the value previously ascertained and agreed to.

¹ 23 Law J. Rep. (N. S.) C. P. 48.

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DEBT by the plaintiffs, as assignees of one Hutchings, a bankrupt, for goods sold and delivered by Hutchings to the defendant, for work and labor, for interest, and upon an account stated.

Pleas — never indebted, and payment; and issue thereon.

The cause was tried, before Cresswell, J., at the second sittings for London in last Michaelmas term, when it appeared that in the year 1851 Hutchings had entered into a contract with the Netherlands Land Inclosure Company, to embank a portion of the River Scheldt, and for that purpose had provided at the spot plant and materials to a large amount. In October, 1852, Hutchings having got into difficulties was desirous of abandoning the contract, and with that view he made a parol agreement with the defendant that two persons, one on behalf of each, should be sent over to the works, to take an inventory, and to value the plant and materials, and that, in the event of their disagreeing, the value should be left to arbitration. In pursuance of this agreement, two persons went over and made a valuation, and an inventory, bearing date the 8th of March, 1853, was drawn up, which stated the value to be 4,509*l.* 12*s.*, and on the 31st of March the defendant and Hutchings signed a memorandum at the foot of it, as follows: "Agreed between Mr. H. Fowler and myself, 4,509*l.* 12*s.*" Also, a few days after, on Hutchings proposing to draw a bill upon the defendant for that amount, at two months, the defendant replied that he would give no bill, but that when the money was wanted it should be ready. On the 3d of April following, he took possession of the materials mentioned in the inventory. On the 28th of May articles of agreement were drawn up between the defendant of the first part, Hutchings of the second part, and his inspectors of the third part, which contained the following clause: — "It is agreed that Hutchings shall sell, and Fowler shall purchase, all such parts of the plant, materials, and things now on or about the works, &c., which belong to the said Hutchings as his separate property, and that the price to be paid for the same shall be the fair amount of the value thereof, such amount to be settled, (in case the parties shall differ as to the same,) by arbitration in manner hereinafter mentioned; and that the said Fowler, his executors, administrators or assigns, shall pay to the said Hutchings, his executors or administrators, the amount of such price or value, within two calendar months after such price or value shall have been fixed or determined as aforesaid." There was also a clause providing for arbitration. Hutchings was made a bankrupt on the 30th of August, 1853; and the defendant having refused to pay the 4,509*l.* 12*s.*, the amount of the valuation, the present action was brought by the assignees.

For the defendant it was contended, that the written contract was prospective, and contemplated a future settlement, either by agreement or by arbitration, which had never been made, and that there was nothing to show that the arrangement come to in March was to be binding. For the plaintiffs, it was contended that, independently of the written contract, the plaintiffs had a good cause of action for goods sold and delivered, and that the written contract did not alter

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their position ; but that if they were bound to recover on the written contract, then that the arrangement of March, being originally made for the purpose of being applied to that contract, was to be considered as still subsisting at the date of it ; and, therefore, that the amount was fixed in accordance with the arrangement of March, and that the two months ran from the date of the written contract. The learned Judge was of that opinion, and also that the plaintiffs were bound to recover on the written contract, or not at all. A verdict was entered for the plaintiffs ; and

November 23, *Quain*, obtained a rule for new trial, on the ground of misdirection ; against which —

Byles, Sergt., and *Willes*, now showed cause. Independently of the written contract, the plaintiffs are entitled to recover as for goods sold and delivered. There was a valid sale when the inventory was signed by Hutchings and the defendant at a fixed sum ; the defendant has ever since had possession of the goods, and has recognized the validity of the sale by a promise to pay. But if the plaintiffs are bound to recover on the written contract, they are entitled to do so. The signing the inventory and the subsequent contract must be treated as one transaction, and that an interval of some months elapsed between the two is no more material than if an interval of only a minute had elapsed. Both parties were in a state of consent as to the price in March, and it never was contended that there had been any difference between them ; they must be taken, therefore, to have been in the same state of consent in May.

[MAULE, J. I am disposed to think that, as the second agreement does not in terms rescind the first, the first subsists as to the amount, that being the true amount. With respect to the arbitration clause, the only other mode of settling contemplated, except by agreement, that is only to apply in case of any dispute or difference between the parties ; but there does not appear to have been any dispute or difference whatever.]

Quain, in support of the rule. The original agreement of March, when reduced into writing in May, was thereby rescinded, and the latter contract contemplates a future settlement in express terms. If not, from what date are the two months for payment to run ? If from the date of the original agreement, they would have expired before the clause providing for the time of payment had been written. Also, if the sum had been definitely fixed in March, a clause providing for arbitration in the event of difference as to the amount would never have been introduced.

[WILLIAMS, J. Suppose, after the contract had been reduced into writing, the defendant had said, he was satisfied with the amount previously fixed upon, would not that have been evidence for the jury in this action ?]

Yes ; but there is no evidence that they had agreed to the price after the contract had been reduced into writing.

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MAULE, J. I think this rule must be discharged; and I will deal with the case on the supposition of Mr. Quain, that the plaintiff must recover on the written contract. This is an action for goods sold and delivered, of which the defendant had been in possession for five or six months; and the question as to the plaintiffs' right to recover arises upon the construction of a written instrument, which I will take as the only document in writing at all. [His Lordship read the clause as above.] That is to be construed, as it appears to me, as a sale of the plant and materials at a fair value, with a provision that, if either party chooses, the value may be inquired into by arbitration. Now, neither party has wished that inquiry to be made; the event has never arisen upon which the clause providing for arbitration was to apply; the parties are, therefore, remitted to a sale at a fair value. What was a fair value seems to have been accurately determined, for the defendant and Hutchings met and came to an elaborate and detailed settlement as to that, and that is strong evidence that the amount so agreed upon, though not perhaps bindingly referred to in the written contract, was the fair value about which they were contracting. It also further appeared that this action was not brought till many months after they had made the contract, and yet no dispute or difference as to the value had ever arisen. I think, therefore, that the amount agreed upon in March is the fair value which the plaintiffs are entitled to recover, and that this rule must be discharged.

WILLIAMS, J. I entirely agree with my brother Maule. I am inclined to think that our decision may also be supported on the ground that justice would be defeated if this rule were made absolute. Mr. Quain does not dispute that if the defendant, after this clause had been agreed to, had expressly assented to the amount originally fixed upon as the fair value, this would have been evidence for the jury that the price had been determined within the meaning of the contract. If so, I think the defendant's conduct since May is tantamount to an adoption of the price originally agreed upon in March.

TALFOURD, J., concurred.¹

Rule discharged.

¹ Cresswell, J., had left the court.

Read v. Teakle.

READ v. TEAKLE.¹

April 25, 1853.

Husband and Wife—Evidence in action for Goods sold to Wife.

In an action for goods supplied to the wife on her order alone, the question is, (in the absence of such evidence of necessity as may show an agency in law,) whether there was an agency or authority in fact; and where the question had been left to the jury solely on the point whether the goods were necessities:—

Held, a misdirection, and a new trial granted.

MR. KEMPLAY moved for a rule to show cause why there should not be a new trial in this case, which had been tried before the sheriff. The action was for music, supplied to the defendant's wife. He moved on the ground of misdirection, and also on the ground that the verdict, (for the plaintiff,) was against evidence. The only evidence for the plaintiff was that of the plaintiff himself, who said, "The defendant's wife dealt with me previous to March, 1851. All the goods I sue for were supplied to her. I sent my bill to the defendant's house at Christmas, 1851. She promised to pay me. On the 10th of July, I received a notice from the defendant repudiating any orders. That was after the supply of the goods. No account was ever returned to me. I never saw the defendant. His wife took from my shop what she wished for. The defendant never ordered any goods." The defendant was called and said his income was 380*l.* a year, out of which he allowed his wife (who however lived with him) 30*l.*; that he paid 65*l.* a year for rent; and that he had never given any authority for the orders. This was the whole of the evidence. The undersheriff told the jury that the question was, whether these goods were necessities. But it was now contended that this was only one circumstance to be submitted to the jury with others; for, *non constat*, that the music was necessary for the wife of the defendant, however it might be necessary in the abstract. He might have furnished her with plenty, or with money to purchase it; and there was evidence of that in this case. And the real question for the jury was one of authority or agency. The liability of the husband for goods supplied to the wife depends upon whether she is his agent. *Laird v. Iremonger*, 13 M. & W. 368. And that is a question for the jury on the evidence, and does not depend, as a matter of law, upon whether the goods are necessities.

[JERVIS, C. J. Sometimes the agency must be a question of law. Suppose the wife wants a dress, and the husband expressly prohibits her from ordering it; which way are the jury to find?]

That would depend upon whether she were absolutely in want of a

¹ 1 Common Law Rep. 200; 17 Jur. 841; 22 Law J. Rep. (N. S.) C. P. 167. Before JERVIS, C. J., CRESSWELL, J., WILLIAMS, J., and TALFOURD, J.

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dress; that is to say, had none at all. In such extreme cases there may be an agency in law. Thus it has been lately held that the husband is liable for necessities supplied to the wife during his lunacy.¹

[JERVIS, C. J., referred to *Smart v. Ilberry*, 10 M. & W. 1.]

There the question was as to the liability of the wife for goods ordered by her after her husband's death, of which both the plaintiff and herself were ignorant at the time. There was ample evidence in that case of the wife's authority to bind her husband, if he had been still alive.

[JERVIS, C. J. But there the point was rather, that the agency in fact had not been determined by notice of his death.]

In the present case it might well be that the music was a "necessary," and yet it did not follow that there was any agency or authority in fact; and it is submitted that there is nothing to show in the case an agency or authority in law, any more than in the case in which the wife bought fancy birds. *Freestone v. Butcher*, 9 C. & P. 643. He also referred to *Montague v. Benedict*, 3 B. & C. 53.

PER CURIAM. Take a rule.

On a subsequent day *Brewer* appeared to show cause. He admitted that he could not defend the ruling of the sheriff, supposing that it was simply as stated in the affidavit of the defendant, and that he had left the case solely on the question of necessities. Accordingly,

*Rule absolute.*²

GRAHAM & another, Assignees, v. FURBER.³

November 11, 1853.

Bankruptcy—Right of true Owner to take back Goods of which Bankrupt is reputed Owner—Effect of Order under the 12 & 13 Vict. c. 106, s. 125.

The true owner has a right, at any time before the fiat, to take back his goods when he has allowed the bankrupt to have the possession of as the repeated order provided in case of without notice of any prior act of bankruptcy, it being "a transaction" with the bankrupt, within the meaning of the 133d section of the 12 & 13 Vict. c. 106, and is therefore protected.

¹ *Read v. Legard*, 6 Exch. Rep. 636; 4 C. 4 Eng. Rep. 523. And it has been also lately held that he is liable for the necessary expense of the descent instrument of his wife, from whom he lived separate, without any express authority; and even although the party incurring the expense is a mere volunteer. *Andrew v. Kerrison*, 19 C. B. 776.

² See *Reneaux v. Teakle*, 20 Eng. Rep. 345.

³ 18 Jur. 61; 23 Law J. Rep. (N. S.) C. P. 10; 2 Common Law Rep. 452.

Morgan v. Couchman.

the language to the same sense as if he had sworn absolutely that there was payment. The facts being stated, the conclusion that they operated as payment is mere inference of law. It cannot be said that the plaintiff was swearing implicitly to some other matter of fact which would make the whole amount to payment. You cannot in such a case supply any fact. There would be no perjury by the plaintiff if the affidavit were true, striking out the word payment. It does not appear that there was any agreement that any thing which took place between Golden and the defendant should enure as a payment, and I do not think the facts show any thing from which a jury could find the fact of payment. I should have said if the jury had found there was a payment they were wrong, and their verdict ought to be set aside.

JERVIS, C. J., concurred.¹

WILLIAMS, J. I am of the same opinion. The affidavit does not in itself contain any facts which would constitute payment in point of law. It also appeared that the evidence, independent of the affidavit, was not such that the defendants could have asked the jury for their verdict. It was contended for the defendant that the plaintiff was estopped from contesting the fact. The judge said he considered that a point of law, and reserved it, and it is decided against the defendant. But it is now said for the defendant that there was a scintilla of evidence, and that he might have gone to the jury upon it. But that was not insisted on at the trial. If there had been a scintilla of evidence, a verdict upon it would have been very unsatisfactory. But where counsel takes the course which was taken here at the trial, he ought not to fall back on a point like this.

TALFOURD, J. I am entirely of the same opinion. I do not think that this is a case where some question of fact escaped the attention of counsel. The intention must have been that the case should turn upon the effect of the affidavit. That must have been the meaning of the agreement at *Nisi Prius*.

Rule discharged.

¹ His lordship was out of court at the conclusion of the argument.

 Cooper v. Parker.

COOPER v. PARKER.¹

November 5, 1853.

Contract — Consideration — Acceptance of Less Sum in Satisfaction of Greater — Pleading.

To a declaration for work and labor, the defendant pleaded, that after the present cause of action, and before suit, the plaintiff levied a plaint against the defendant in the county court for 50*l.*, that the defendant being then and at the time of the accruing of the cause of action for which the plaint was levied, an infant, gave notice that he should defend himself against the plaint on that ground, and that before trial in the county court, the plaintiff and defendant agreed that the defendant should pay the plaintiff's costs and 30*l.*, and that the plaintiff should accept the 30*l.* and the performance by the defendant of the agreement in satisfaction as well of the cause of action for which the plaint was levied, as of all causes of action which the plaintiff then had against the defendant. Averment of payment before suit by the defendant of the 30*l.* and costs, and acceptance by the plaintiff in pursuance of the agreement:—

Held, that the averment of the defendant being an infant when the cause of action arose for which the plaint was levied, was immaterial, and that the plea was a good defence without that averment.

THE declaration was for work and labor by the plaintiff as solicitor to the defendant, for money lent, money paid, and money due upon an account stated.

The defendant pleaded, first, never indebted; secondly, payment; thirdly, the Statute of Limitations; fourthly, infancy; fifthly, that after the accruing of the supposed causes of action in the declaration mentioned, and whilst the same were subsisting, and before the commencement of this suit, the plaintiff levied his plaint against the defendant in the County Court of Cheshire, holden at Congleton, then having jurisdiction in that behalf, to recover the sum of 50*l.* then claimed by the plaintiff to be due from the defendant to the plaintiff, to wit, for money lent and money paid by the plaintiff for the use of the defendant at his request, and for interest thereon from the 14th day of May, A. D. 1846, and also to recover the same on account stated; that the defendant then defended himself against the said plaint, and being then and at the time of the accruing of the said supposed causes of action for which the said plaint was levied as aforesaid, an infant under the age of twenty-one years, gave due notice in the said suit in the said county court that he should defend himself against the said plaint on the ground of infancy. And thereupon and before any trial had of the said suit in the said county court, and before the commencement of this suit, it was agreed by and between the plaintiff and the defendant that the defendant should pay to the plaintiff the sum of 30*l.*, and that the defendant should pay the costs of the plaintiff by him incurred in the said plaint, and that the defendant should make such last-mentioned payments respectively,

¹ 23 Law J. Rep. (N. S.) C. P. 41.

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this was followed by the 19 Geo. 2, c. 22, s. 1; the 46 Geo. 3, c. 133, s. 1; the 6 Geo. 4, c. 16, ss. 72, 81, 82, 84; the 2 & 3 Vict. c. 11, s. 12; and the 2 & 3 Vict. c. 29, s. 1; which last was the first general act which rendered valid all dealings with the bankrupt down to the time of the fiat. The 12 & 13 Vict. c. 106, s. 133, is similar to the 2 & 3 Vict. c. 29, s. 1, and, like the preceding protective clauses, refers to cases only in which the doctrine of relation applies; but the question as to goods in the reputed ownership of the bankrupt has no reference to that doctrine. The cases on the subject, and which will be relied on by the other side, are founded on the decision of Lord Lyndhurst in *Ex parte Styant*, (reported under the name of *Ex parte Smith*, 2 M. D. & De G. 213, 219.) There a policy of assurance was deposited by a trader with his creditor as a security for his debt, but no notice of such deposit was given to the insurance office until after the trader had committed an act of bankruptcy; but the creditor had not had notice of any act of bankruptcy having been committed, and he gave notice of the deposit before the fiat issued. It was, however, in that case contended by counsel on behalf of the assignees, that the notice to the insurance office was necessary to render the transaction binding against other claimants; and Lord Lyndhurst, taking advantage of this, assumed that "the transaction or dealing" consisted of the deposit of the policy and the notice to the office, and then held, that as in that case the whole of the transaction was completed before the fiat, without notice of a prior act of bankruptcy, it was protected by the 2 & 3 Vict. c. 29, s. 1. But how is such a case analogous to the case of goods left in the possession of the bankrupt up to the time of his committing the act of bankruptcy? The taking the goods out of the possession of such bankrupt cannot properly be considered as necessary to complete the transaction of leaving them in the bankrupt's possession. *Pariente v. Pennell*, 2 Moo. & R. 516, and *Young v. Hope*, 2 Exch. 105, were decided on the authority of *Ex parte Styant*; and moreover the case of *Pariente v. Pennell* was only a decision at Nisi Prius. In the next place, it is submitted that the order of the Court of Bankruptcy ordering the goods to be sold was final and conclusive, unless appealed against to the Lords Justices, as in the case of any other order in bankruptcy. The case of *Heslop v. Baker*, 6 Exch. 740; s. c. 4 Eng. Rep. 555, has decided that the assignees have no title to goods of which the bankrupt was reputed owner under section 125, unless such order be made. It is submitted that this is a matter which is now left to the Court of Bankruptcy alone to determine. The clauses which relate to the jurisdiction of that court, and are classed accordingly under that head in the 12 & 13 Vict. c. 106, are sections 12, 14, 15, 16, and 18. It will, perhaps, be said that the order cannot be final, as, according to *Ex parte Barlow*, 22 Law J. Rep. (n. s.) Bank., 15; s. c. 19 Eng. Rep. 464, the Lords Justices said that the order may be made *ex parte*; but the correctness of that decision is canvassed and dissented from by Mr. Commissioner Holroyd, in an elaborate judgment lately delivered in *Re Plimmer*. [The learned counsel read this only from a MS.]

[WILLIAMS, J. What notice is the true owner to have of the proceeding in order to make the order binding on him?]

Personal notice.

[WILLIAMS, J. But suppose the wrong person was served with the summons, and he was to say nothing, and the court were afterwards to make the order, would the true owner be bound by it?]

No; in that case there would have been no valid order, but otherwise when the right party has been brought before the court. It is submitted that the order is binding and final, subject only to the usual appeal to the Vice-Chancellor, the Lord Chancellor, and the House of Lords.

Willes, contra. Although goods, of which the trader is the reputed owner at the time of his bankruptcy, are liable to be sold by an order of the commissioner, made under the 125th section of the act, yet it is submitted that this is a case to which the 133d section also applies, and that by virtue of that last section the true owner of the goods has the right to relieve himself from the operation of the 125th section, and that he can do so provided he takes the goods out of the order and disposition of the bankrupt before the filing of the petition, and before he has had notice of any act of bankruptcy committed by him. It is said that the 125th section would then be inoperative; but that is not so. The effect of the 125th and 133d sections, taken together, is, that if the true owner allows his goods to be in the order and disposition of the trader as the reputed owner thereof, and the trader commit an act of bankruptcy, and a petition in bankruptcy is filed, then if the true owner has had notice of the act of bankruptcy before he has taken the goods out of the possession of the trader, they pass to the assignees; but if the true owner gets the goods back before he has had such notice, and before the fiat, he is entitled to retain them, and they do not pass to the assignees. There are three distinct authorities in support of this. They were decided on the 2 & 3 Vict. c. 29, s. 1, but which, as regards the present question, does not differ from this 133d section. The case of *Ex parte Styan* has not been explained away by the other side, and it is expressly in point, for the taking here of the goods out of the possession of the bankrupt was as much a transaction with him as the deposit of the policy and notice to the assurers was in that case. Then, besides the decision of Tindal, C. J., in *Pariente v. Pennell*, there is the judgment of the Court of Exchequer in *Young v. Hope*, adopting the decision of Lord Lyndhurst in *Ex parte Styan*, and also stating that, independently of that case, they should have come to the same conclusion. Then as to the point with respect to the effect of the order. It is said that it is final, and it is argued as if it was a judgment of the court, and the 12th section gave the Court of Bankruptcy a new jurisdiction; but that is not so; the object of the 12th section is rather for the purpose of giving an appeal, than for conferring a new jurisdiction. The 126th section shows that the order made under the 125th section cannot be binding, for that section, which gives the court the power of selling certain property of a bankrupt, which is

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has when insolvent conveyed away for the benefit of his family, uses similar words to those in the 125th as to the power of the court to sell for the benefit of the bankrupt's creditors; but it goes on afterwards to expressly declare, "that every such sale shall be valid against the bankrupt and such children," &c.; showing clearly that, but for such last words, the legislature did not consider that the mere power given to the court to order the sale would have the effect of being binding on the parties. There is, moreover, the express decision of the Lords Justices in *Ex parte Barlow*, that the order ought to be made *ex parte*; and consequently that case shows that the order cannot be conclusive; and this court adopted that opinion of the Lords Justices in the late case of *Quartermaine v. Bittlestone*, 17 Jur. 281; s. c. 20 Eng. Rep. 204.

Bovill, in reply.

JERVIS, C. J. I am of opinion that our judgment must be for the defendant. The case has been argued with great ability and at considerable length by Mr. Bovill, for the purpose of reviewing the correctness of previous decisions. The course, however, which has been taken by the plaintiffs in bringing their action in this court is an unfortunate one for them; for although it would appear not to be the practice of the Commissioners of Bankruptcy to defer to the decisions of the Lords Justices, it is the custom of this court to defer to the decisions of judges of other courts of co-ordinate jurisdiction. It seems to me that we are precluded by authority from entering into the questions which have been raised before us. The first question is, whether the true owner has the right, under sections 125 and 133 of the Bankruptcy Law Consolidation Act, to take his goods out of the possession of the bankrupt (the reputed owner thereof) before the fiat, and without knowledge of the act of bankruptcy. Now, this is a point which, I think, has been determined by three express decisions, namely, *Ex parte Styan*, *Pariente v. Pennell*, and *Young v. Hope*; and even if there be some mistake in the former of these cases, which, however, I do not think there is, the Court of Exchequer decided the same point in *Young v. Hope*, as they expressly said, independently of, and without reference to, the case of *Ex parte Styan*. It is clear that the taking of the defendant's goods out of the possession of the bankrupt was a dealing and transaction with the bankrupt, and it is a mistake to say that the doctrine of relation to the act of bankruptcy does not apply to it as much as to any other case; but it is enough to say that we are in this matter concluded by authority. As to the other point, that is also determined by authority. In *Ex parte Barlow* it was held by the Lords Justices that the order might, and indeed should, be made *ex parte*; it follows, therefore, that the order is not binding and final, and this view of the case was adopted by this court in *Quartermaine v. Bittlestone*. It appears that Mr. Commissioner Holroyd has objected to the decision in *Ex parte Barlow*, and that he is of opinion that the order is final, and that the true owner has an opportunity of opposing its being made; but he

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has not pointed out what parties are to be summoned, or how the true owner is to be brought before him, or to have notice of the matter. It is sufficient, however, to say that I adhere to the previous decisions, being satisfied with them, as well as bound by them.

MAULE, J. I am of the same opinion. I think that these goods not being in the order and disposition of the bankrupt at the time of the fiat and notice of the act of bankruptcy, they are remitted to the condition in which they would formerly have been if they had ceased to be in the order and disposition of the bankrupt at the time of the act of bankruptcy. It was thought (and very justly so) to be hard against the true owner, who had allowed another person to have the order and disposition of his goods, that he should have his goods taken from him by the assignees in bankruptcy, when he had not been guilty of any other fault than that of want of a stern strictness. The legislature intended to relieve this by providing, that if the goods got back to the true owner thereof before the fiat, they were to be taken to have got back before the act of bankruptcy. This is, I think, effected by the words "transactions by and with any bankrupt," in the 133d section. It is a "transaction" within the meaning of that section, if the owner takes back his goods, or does his best to do so; and I think he is placed by the legislature in the same position as he would have been in before the act if he had done the same thing before the act of bankruptcy. As to the other question, I have listened to the judgment of Mr. Holroyd, and I confess I cannot go along with it. I should have thought that it was necessary to have pointed out how the assignees were to proceed before the commissioner, in order to make his order binding on all parties. He says they cannot do so without giving the party concerned an opportunity of appearing. Does that mean all persons? If the assignee want to sell the goods, they are to have the same power as before, only they are to be subject to the guidance of the commissioner. I think it would be very hard if a person is to be deprived of his goods, without being heard before a jury, merely by an order of a commissioner, which is to be final and conclusive if confirmed on appeal, and which appeal would be decided by the court looking at the same evidence as was before the commissioner. This is ousting a person of his right to trial by jury, and the statute should not, I think, be taken to have done this, without there were clear words to that effect. It seems to me that the object of the enactment was to protect the true owner; and as it was formerly in the power of the assignees to sell the goods, the act says that this shall no longer be in the discretion of the assignees, but of the commissioner. The commissioner is empowered to inquire into the matter, and to make an order enabling the assignees to sell, and the judgment so come to is to be final, and is not to be appealed from otherwise than is provided; but that does not mean that it is to be binding on persons who have not been heard against it. It seems to me, that, both on the language of the statute and on the authority of the cases, the defendant is entitled to our judgment.

Doe d. Croft v. Tidbury.

WILLIAMS, J. I am of the same opinion. On the first point, the case of *Young v. Hope* is directly in point, and we are bound by it, even if we were dissatisfied with it; but I see no reason why we should be dissatisfied with the decision in that case. As to the second point, I think that we should be bound by the decision of the Lords Justices in *Ex parte Barlow*, unless there were good reasons shown for our dissenting from it; but so far from that being the case, I think that it was rightly decided, and that it would lead to inconvenience to require the party to be served before the order for sale was made.

TALFOURD, J., concurred.

Judgment for the defendant.

DOE d. CROFT & another v. TIDBURY.¹

November 9, 1853, and January, 30, 1854.

Stamp — Grant by several of one Subject-Matter — Construction of Grant — Proviso Reservation, not Regrant — Encroachment, who entitled to — Landlord and Tenant.

By an indenture, reciting that A and the other parties of the first part, were severally in the occupation of encroachments which had been made on a common, by inclosing land, and building cottages thereon, those parties jointly conveyed all the encroachments, &c., to the parties of the second part, in fee, in trust for the commoners, provided that the parties of the first part and their wives should have the liberty and privilege of occupying the respective messuages conveyed, at the rent of 1s. yearly, payable to J. C. (one of the trustees) as lord of the manor: —

Held, first, that one conveyance stamp was sufficient, there being a community of the same subject-matter as to all the grantors.

Secondly, that the proviso was not a re-grant to the encroachers of a life-estate, so as to require an additional stamp, but merely a personal liberty or privilege, which might be treated as part of the consideration for their execution of the deed, the common object of which was to extinguish their rights after their deaths, and in the mean time to give them liberty and permission to occupy their encroachments.

A, after the execution of the deed, and while in possession of his part of the encroachments conveyed, made a fresh encroachment on the waste which adjoined the other, and he occupied the two together for thirty-eight years, but five years before his death, conveyed to B. the later encroachment for a good consideration: —

Held, in an ejectment by the trustees against B, that as A, when the fresh encroachment was made, was tenant (for life at most) to the trustees, and occupied it with the land of which he was tenant, it must be assumed that he made the fresh encroachment for the aggrandisement of the estate, and that therefore it was part of the holding when the tenancy expired.

Where the power to encroach upon a waste is derived from the occupation of premises held under a landlord, and the encroachment is occupied as if it were part of the holding, at the end of the tenancy the presumption, as between the landlord and tenant, is, that the encroachment is part of the holding, and it belongs to the landlord; but the tenant may rebut the presumption by clear evidence that he intended the encroachment for himself at the time he made it.

¹ 18 Jur. 468; 23 Law J. Rep. (N. S.) C. P. 57; 2 Common Law Rep. 347.

Doe *d.* Croft *v.* Tidbury.

EJECTMENT for land in the chapelry of Greenham, in the parish of Thatcham, in the county of Berks. At the trial, before Wightman, J., at the Berkshire Spring Assizes, 1852, a verdict was found for the plaintiff, subject to a special case for the opinion of this court. The declaration contained four counts: the first and third on the demise of Archer James Croft, with the respective dates of the 1st January, 1832, and the 20th May, 1847; the second and fourth on the demise of Samuel Skinner, with the same respective dates. Archer James Croft, the lessor of the plaintiff in the first and third demises, was and is lord of the manor of Greenham, and is the son and heir of James Croft, deceased, who, in 1806, and until his death on the 17th January, 1829, was lord of the said manor. Samuel Skinner, the lessor of the plaintiff in the second and fourth demise, is the eldest son and heir at law of Samuel Skinner, who was the person named by that name in certain deeds of the 22d and 23d April, 1806, and who died on the 20th October, 1834, having survived James Croft, Thomas Clark, Joseph Moss, and John Blay, also mentioned therein. The premises sought to be recovered are three pieces of land, Y, P, and G, (colored respectively yellow, pink, and green, on a plan attached to the case.) In or before the year 1800, John Preston inclosed from the waste of Greenham Common, within the manor of Greenham, certain land, B, (colored blue on the plan,) and built thereon a cottage, in which he lived with his wife, Phoebe Preston, until his death in 1801, and she thenceforward continued in possession of that land. In 1802 the said Phoebe Preston, being still in possession, married James Tidbury, who thereupon entered upon the land B, and continued to live with his wife in the cottage thereon, erected by the said John Preston and to occupy the same until his death in 1846. On the 22d and 23d April, 1806, indentures of lease and release were executed by James Tidbury and Phoebe his wife, and the several other persons whose names and seals are described as being thereto subscribed and affixed. [These deeds were made part of the case. The release was executed by James Tidbury and Phoebe his wife, widow of John Preston, deceased, and several other persons, of the first part; James Croft, Esq., lord of the manor of Greenham, of the second part; and the said James Croft, Thomas Clark, Samuel Skinner, Joseph Moss, and John Blay, of the third part. After reciting that divers encroachments had been made on Greenham Common, in the manor of Greenham, by building cottages, &c., and inclosing land, which encroachments had been presented at a court in April, 1802; and that the several parties of the first part were respectively in possession or occupation of the messuages, &c., thereafter expressed to be in their respective possession or occupation, and to be thereby conveyed, which were some of the said encroachments; and that the parties of the first part had agreed to convey the said premises, &c., and all their several and respective rights, estates, &c., therein, to the parties of the third part; the deed then witnessed, that the parties of the first part "do, and each and every of them doth, grant, sell, release," &c., unto the parties of the third part, in fee, "all that messuage, cottage, tenement, or other building erected and built by the said John Preston, deceased, and

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now in the possession or occupation of the said James Tidbury and Phœbe his wife, and the garden or other ground and land laid thereto or inclosed, held, and occupied therewith," (and so on of the other encroachments, particularly describing them,) with all the appurtenances, &c., in trust for themselves, their heirs or assigns, respectively, and all other the inhabitants and owners and occupiers of lands or hereditaments of and in the manor of Greenham aforesaid, for the time being, according to their several and respective estates, rights, and interests in, to, and over the said common, and for no other purpose: "provided always, and it is hereby declared and agreed by and between all the said parties hereto, that the said several parties of the first part, and their now respective wives, shall and may have the liberty and privilege of holding, occupying, and enjoying, during their respective lives, the respective messuages, cottages, &c., by them respectively released and conveyed, each of them rendering and paying to the said James Croft, his heirs or assigns, as lord of the said manor, the yearly rent or sum of 1s. on Michaelmas-day yearly, during their respective lives, as a quit-rent or acknowledgment for and on account of such liberty and privilege of occupying the said respective premises during their respective lives as aforesaid." The several other persons whose names are mentioned as parties of the first part were persons who held distinct and independent tenements, described in the said indenture of release as being in their occupation, in their own right, or in right of their wives, where their wives are mentioned; and neither the said James Tidbury nor Phœbe his wife had any right, title, or interest in any other of the tenements therein mentioned and conveyed, besides those described as being in his possession; nor had any of the said other parties thereto of the first part any right, title, or interest in the tenements described as in his occupation; and each of the several other parties of the first part had no right, title, or interest whatever in any of the other tenements therein described and conveyed, besides those which are described as being in his or her occupation, but each had a distinct title and right. The said indenture of bargain and sale or lease for a year, when produced at the trial, was only stamped with one stamp, which denoted a duty of 1*l.* 10*s.* to have been paid thereon; and the said indenture of release, when so produced at the said trial, was only stamped with two stamps, which respectively denoted a duty of 30*s.* on the first skin, and 20*s.* on the second skin, to have been paid thereon; and neither of the said indentures bore any other stamp, nor did it appear that any other duty had been paid in respect thereof. It was thereupon objected by the counsel for the defendant, that the indentures, or one of them, ought not to be admitted in evidence, the same being insufficiently or improperly stamped; but the learned judge admitted them in evidence, subject to the said objection, and to the opinion of the court thereupon. In the year 1808 the said James Tidbury inclosed from the waste of Greenham Common, within the manor of Greenham, the land G and P, (then one piece, but afterwards subdivided,) and continued to hold and occupy the same until his death in 1846. At the time, and ever since this inclosure was made, there was and has been a

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fence between the land B and G and P, which fence divided the one from the other; but there was at first a gate in the fence, which remained there a short time, until the land Y was inclosed, as hereinafter stated. By this gate persons could pass from B to G and P, which for some time remained in one undivided inclosure; but at the time the land Y was inclosed, the said James Tidbury stopped up this gateway, and thenceforth the only mode of access to G and P was by passing out of the land B into and along the open common, and thence through Y. The said James Tidbury, a few years after the inclosure by him of G and P, built a blacksmith's shop on P, and separated the part P from G by a laurel hedge; and thenceforth he and his son, James Tidbury the younger, worked in the blacksmith's shop. About the year 1814, James Tidbury inclosed from the waste of Greenham Common, within the manor of Greenham, the land Y, which was likewise separated, and has always continued to be separated, by a fence from the parts B and P, and he continued either to occupy or underlet the same, and likewise the parts B and P and G, until his death in 1846. B contained 36 perches, G and P contained together 1 rood and 32 perches, and Y 12 perches. Phoebe Tidbury died before her husband, James Tidbury. James Tidbury died in 1846. In 1841, James Tidbury conveyed to the defendant, for a money consideration, G, P, and Y. Shortly after the death of James Tidbury, in 1846, the land B was delivered up to Archer James Croft, one of the lessors of the plaintiff, by James Preston, who was the son of Phoebe Tidbury by her first husband, James Preston, he having been permitted by his father-in-law, James Tidbury, to reside with him there, until James Tidbury's death, and he had then taken entire possession of it. There was no evidence of any payment of any quit or other rent or acknowledgment ever having been paid or made by the said James Tidbury or Solomon Tidbury to any one, in respect of any part of the said before-mentioned lands. Solomon Tidbury, the defendant, at the death of James Tidbury, was in possession, and has ever since retained possession, of G, P, and Y. In 1846, shortly after James Tidbury's death, the authorized agent of Archer James Croft, one of the lessors of the plaintiff, demanded possession, in the name and on behalf of Archer James Croft, of G, P, and Y, from the defendant, Solomon Tidbury, he then being in possession of the same. The defendant refused to deliver up possession of the same, or any part thereof. The counsel for the defendant contended, that upon these facts the plaintiff had not established his right to recover in this action the said lands, G, P, and Y, sought to be recovered; but by consent and arrangement between the parties, the jury found a verdict for the lessors of the plaintiff, subject to the opinion of this court upon the facts above stated. The court was to be at liberty to draw any inference from the facts stated which a jury might have drawn. The questions for the opinion of the court were, whether the said indentures of lease and release were admissible in evidence, and also whether the plaintiff, upon the facts above stated, had established his title to recover in this action on any, and if any, on which of the said demises, for any, and if any, what part of the said lands so sought to be recovered. If

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the said indentures of lease and release, or either of them, were inadmissible in evidence under the circumstances above mentioned, a verdict was to be entered for the defendant upon the second and fourth counts. If the indentures of lease and release, or either of them, were inadmissible, and the plaintiff had not without them established his right to recover any part of the said land, a verdict was to be entered for the defendant; and such verdict was also to be entered if, with those deeds, they being admissible, he had not established such title. If the plaintiff had established his title to recover the whole or any part on all or any of the said demises, the verdict was to be entered for the plaintiff accordingly for the whole or such part or parts upon all or such of the said demises in respect of which he should be entitled to recover, and for the defendant as to the residue, if any.

Nov. 9. *Selfe*, (*Whateley*, Q. C., was with him,) for the plaintiff. The first question is as to the sufficiency of the stamp on the lease and release; and two objections will be made to its sufficiency: first, that the deed conveyed separate interests of the encroachers, and that separate conveyance stamps were therefore necessary; but it is submitted that the conveyance was a joint conveyance by all, of the interest of each, and that one stamp was sufficient. The Stamp Act applicable to the present case is the 44 Geo. 3, c. 98, and in Schedule (A.) a stamp of 1*l.* 10*s.* is imposed on a "deed or other instrument of conveyance, surrender, lease and release, grant," &c., "or any other deed, (not otherwise charged in the schedule,) for any number of words not amounting to thirty sheets of seventy-two words each, and an additional stamp of 1*l.* upon every entire quantity of fifteen sheets above the first fifteen." The release, therefore, was properly stamped, if it is but one deed; and the fact that several persons jointly conveyed their interest in one subject-matter does not render it less one deed. *Allen v. Morrison*, 8 B. & Cr. 565. In *Wills v. Bridge*, 4 Exch. 103, it was held, that a deed by which several persons jointly conveyed their separate interests in one subject-matter did not require several stamps. *Shipton v. Thornton*, 9 Ad. & El. 314, and *Hogarth v. Penny*, 14 M. & W. 494, are to the same effect.

[WILLIAMS, J. In the case of *Carpenter v. Buller*, 2 Moo. & R. 298, it was held, that a release executed by several commoners of their separate rights of common over the same waste was sufficient to make them all competent witnesses in an action touching the waste, although it carried but one stamp. So, in *Thomas v. Bird*, 9 M. & W. 68, Tindal, C. J., had admitted at *Nisi Prius* a release by two of the next of kin of their respective interests in an intestate's goods with but one stamp; and Lord Abinger, C. B., says, "We do not say this opinion was not right."]

If the object and subject-matter of the deed, as here, is one common to all the parties conveying, the mere fact that each of the parties has a several interest in the subject-matter does not render several stamps necessary. The second objection to the stamp is, that the proviso giving the grantors and their wives the privilege of residing on

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their respective encroachments during their lives must operate as a regrant, and would therefore require a second stamp for this reconveyance. But this proviso is not a redemise, but a reservation of the life-interest to the grantees — a conveyance subject to the life-interest. The other question is, assuming the deeds to be received in evidence, whether the plaintiff's title to the encroachments P, G, and Y, was made out. These encroachments were all made after the conveyance of 1806; and the land B was not the freehold of the encroacher, he had at most only a life-interest in it. The later encroachments must therefore be taken to be made for the aggrandizement of the estate B. *Bryan v. Winwood*, 1 Taunt. 208; *Doe d. Lloyd v. Jones*, 15 M. & W. 580; *Andrews v. Hailes*, 2 El. & Bl. 349; s. c. 22 Eng. Rep. 139.

[WILLIAMS, J. The annual payment of 1s. is not annexed to the reversion. It is therefore not a rent, but a mere payment by way of acknowledgment.]

Dowdeswell, for the defendant. The deed required several stamps; the recitals show that the conveying parties had each a separate interest in several portions of the common. The law is thus laid down in 1 Ph. Ev. 490, 6th ed. — "If the interest of the parties relates to one thing, which is the subject-matter of the instrument, or, in other words, if the instrument affects the separate interests of several, and there is a community of the same subject-matter as to all the parties, then a single stamp will be sufficient; but where the parties have separate interests in several subject-matters, there ought to be a separate stamp for each party, against whom or in whose favor the instrument is offered in evidence." The deed here has the same operation as if several deeds had been executed, and the stamp laws would then be evaded if only one stamp were held necessary.

[MAULE, J. The stamp laws were not intended to throw any obstacle in the way of executing one deed instead of several.]

But then the one deed must bear the stamps which the several would require. *Rex v. Reeks*, 2 Str. 716. The cases on affidavits, where it has been held that one affidavit sworn by several persons, or by one and used in several causes, requires several stamps, are in point, such as *Rex v. Carlisle*, 1 Chit. 451; *Robson v. Hall*, 1 Peake, 128, is also in point. The case of *Doe d. Copley v. Day*, 13 East, 241, is strongly in point.

[MAULE, J. That was a demise by one to several, and the deed had clearly a distinct operation as to each tenant, and had the same effect precisely as to each as a separate lease to each. But here, suppose there had been separate deeds, would they have effected all that this deed seems to effect? If there had been separate deeds, on the failure of the title of one, the others would not have been liable; but by this deed the trustees have the security of all as to the title of each.]

But that does not affect the question of the stamp.

[MAULE, J. A deed may well be made one as to the question of stamp by the insertion of matter, the omission of which would have

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left it with the operation of several deeds, and as such requiring several stamps.]

Regina v. Eton College, 8 Q. B. 526, is very similar in principle to the present.

[JERVIS, C. J. In that case there was no community of interests.]

Wharton v. Walton, 7 Q. B. 474, and *Lovelock v. Franklyn*, 8 Q. B. 371, are authorities for the defendant on this point. Secondly, the proviso operated as a redemise. In *Doe d. Douglas v. Lock*, 2 Ad. & El. 705, and *Wickham v. Hawker*, 7 M. & W. 63, a conveyance by A. of lands to B. in fee, excepting and reserving to A. the liberty of sporting over the land, was held to be a new grant by B., who executed the deed, and not a reservation. So here, the proviso giving the liberty to the encroachers to reside is a new grant or redemise by the trustees; and the redemise is as distinct as the second contract in *Wharton v. Walton*, and *Lovelock v. Franklyn*, and a second stamp would be necessary.

[WILLIAMS, J. *Worthington v. Warrington*, 5 C. B. 635, is an authority that one stamp would be sufficient.]

Lastly, even if the deeds are admissible, they do not pass the lands in question, but only the land B. The encroachments in question cannot be taken as accretions to the land B. This is not the case of an ordinary landlord and tenant. Here the encroacher had a distinct interest of his own, and cannot be said to have made the fresh inclosures for his *quasi* landlord. Moreover, in *Andrews v. Hailes* there was no deed showing the state of the land; which distinguishes it from this case, for here the deed expressly points out what is leased. In *Doe d. Colclough v. Mulliner*, 1 Esp. 460, Lord Kenyon said that encroachments by a tenant on the waste do not belong to the landlord when there had been no acknowledgment by the tenant that he held such accretion under his landlord; and in *Doe d. Challnor v. Davies*, 1 Esp. 461, Thomson, B., under similar circumstances, intimated a strong opinion against the landlord.

[JERVIS, C. J. In *Doe d. Lloyd v. Jones*, Alderson, B., said, "The presumption of law being that the tenant incloses for the benefit of his landlord, it is for the tenant to rebut that presumption."]

Yes; and the cases of *Doe d. Lewis v. Rees*, 6 Car. & P. 610; *Doe d. Dunraven v. Williams*, 7 Car. & P. 332; and *Doe d. Baddeley v. Massey*, 15 Jur. 1031; s. c. 6 Eng. Rep. 355, are all authorities for the defendant to that extent; for here there are facts sufficient to rebut the presumption, if indeed they are wanted; for it is to be observed, that all the decided cases are cases in which the relation of landlord and tenant strictly existed between the parties. Now, here the payment of 1s., as has been pointed out by Williams, J., is not a rent, but a mere acknowledgment; and therefore the relation of landlord and tenant cannot be said to exist. The defendant here had an interest in the nature at least of a life-estate.

Selfe, in reply. *Wharton v. Walton* must be taken to be overruled by *Worthington v. Warrington*; and *Lovelock v. Franklyn*, though not cited in the latter case, is manifestly distinguishable from it; for

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in *Lovelock v. Franklyn* the lease and agreement related to distinct subject-matters. It is said by the other side, that the relation of landlord and tenant is necessary between the parties in order to enable the remainderman or reversioner to claim the accretion made by the tenant for life or years; but the same doctrine would apply to any relation, as of tenant for life and remainderman or reversioner.

[MAULE, J. In *Andrews v. Hailes* the decision of the court proceeds expressly on the privity between the landlord and tenant.]

It must be conceded that there is certainly no reported case in which the precise relation of landlord and tenant did not exist.

Cur. adv. vult.

January 30. JERVIS, C. J., delivered the judgment of the court.¹ Three points were made in argument upon this case. It was first said that the deeds of the 22d and 23d April, 1806, were improperly stamped, because they convey separate estates from the various parties of the first part, and ought therefore to have been impressed with several stamps. We think there is nothing in this objection. The rule upon this subject is thus correctly laid down in Ph. Ev. 445 — “If the interest of the parties relates to one thing which is the subject-matter of the instrument, or, in other words, if the instrument affects the separate interests of several, and there is a community of the same subject-matter as to all parties, there a single stamp will be sufficient; but where the parties have separate interests in several subject-matters there ought to be a separate stamp for each party.” By the deed in question each of the parties of the first part, the encroachers, profess to convey, not only his own encroachment, but the encroachments of all the other encroachers; and in this respect these deeds are larger in their operation than if each encroacher had conveyed his own encroachment by a separate deed. The encroachments are the subject-matter of the deeds; all the encroachers convey all the encroachments, and all the encroachers therefore have a common interest in the subject-matter. The deeds also affect the separate interests of each encroacher, for the object of the deeds is the extinguishment of the rights which the encroachers had acquired or might acquire by their encroachments, and the permission for the encroachers and their wives to occupy their encroachments during their lives. In this respect each encroacher possesses a several interest, for each abandons any right he may have acquired by encroachment, and obtains for himself and his wife permission to occupy his encroachment during their lives. There is, therefore, a community of the same subject-matter as to all the parties of the first part, and the deeds affect the separate interests of each. Thus the case comes distinctly within the rule laid down by Mr. Phillips; and we therefore think that the first objection cannot be sustained. The second objection is also, in our opinion, untenable. It is said that the latter part of the release,

¹ JERVIS, C. J., MAULE, J., WILLIAMS, J., and TALFOURD, J.

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which confers upon the encroachers and their wives a liberty and privilege of occupying their encroachments during their respective lives, operates as a conveyance or regrant to them of life-estates, which, being chargeable with specific duties, ought to be stamped accordingly. There is no doubt that every instrument is liable to stamp duty, according to its legal operation; and if this deed did not contain a conveyance or regrant to the encroachers of life-estates, and thus embrace two subjects, each of which would be chargeable with a separate duty if contained in a separate deed, the question would be, whether, being stamped in respect of one subject, the other contents of the instrument so stamped are incidental or accessory to that subject in respect of which the stamp is affixed. If they are not, the further duty will attach; if they are, no further duty will be payable. But an examination of the deeds satisfies us that they do not operate as a conveyance or regrant of life-estates to the encroachers. The common object of the deeds was to extinguish the encroachers' right after the death of themselves and their wives, and in the mean time to give them liberty and permission to occupy their encroachments. They do not take by the deeds any interest which they could assign, but merely a personal liberty or privilege, which may be treated as part of the consideration for their execution of the deeds. We have not deemed it necessary to notice the cases which were cited in the argument upon the sufficiency of the stamp, because the rules to which we have referred are well known, and the only question is the application of those rules to the particular case under discussion. The deed, being properly stamped, proves that Tidbury was the tenant of Skinner, the lessor of the plaintiff, up to the year 1816, when Tidbury died, and that he was such tenant in the years 1803 and 1814, when he inclosed from the common, and added to the encroachments held by him under the deed the pieces of land now sought to be recovered. The last question is, whether the land so taken from the common belongs to the encroacher, or to the landlord under whom he held at the time of the encroachment. The rule of law upon this subject is now clear. We need not refer to the different cases which bear upon it, because they are all cited in the very recent case of *Andrews v. Hailes*. Where a tenant, who holds under the lord of a manor, encroaches upon the waste, he is presumed to have approved against the commoners for the benefit of the lord. In other cases, when the power to encroach is derived from the occupation of the premises held from a landlord, and the encroachment is occupied as if it were a part of the holding, then at the end of the tenancy the presumption, as between the landlord and tenant, is, that it is part of the holding, and it belongs to the landlord. We do not mean that the encroachment must, under such circumstances, be taken to have been included in the original letting, for that would conflict with the rule that the tenant may rebut the presumption that he inclosed for his landlord, by clear evidence that he intended the encroachment for himself at the time he made it; but that having been taken from the waste, and added to the holding, it must be assumed to be part of the holding at the termination of the tenancy; in fact,

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that the tenant takes it for the aggrandizement of the estate of which he is tenant, and not for an estate of his own: in other words for the benefit of his landlord, and not for himself. This agrees with what was said by Parke, B., in *Doe d. Lewis v. Bees* — “It is clearly settled that encroachments made by a tenant are made for the benefit of his landlord, unless it appears clearly by some evidence at the time of the making of the encroachment that the tenant intended the encroachments for his own benefit, and not to hold them as he held the farm to which the encroachments were adjacent;” although it does not accord with the reason for the rule as given by some eminent judges. But whatever may be the reason of the rule, the rule itself is clear, and manifestly applies to this case. When the encroachments were made, the encroacher was tenant to the lessor of the plaintiff, and the encroachments were added to and occupied with the land demised during the remainder of the term. It must, therefore, be assumed that the tenant made the encroachments for the aggrandizement of the estate, and that therefore they were part of the holding when the tenancy expired. There is nothing in the objection that the tenants here had an interest in the nature of a life-estate, because in *Doe d. Lloyd v. Jones* the encroacher had a life-estate, and it was held, notwithstanding, that the presumption applied. For these reasons, we think there should be judgment for the plaintiff on the demise in the name of Skinner.

Judgment accordingly for the plaintiff.

In the matter of the Arbitration between WILLIAM LAING and
EDWARD TODD.¹

January 31, 1853.

Arbitrament — Award directing Payment to Stranger.

An award directing payment of a sum of money to a stranger, is not good, unless it appears on the face of the award that such payment is for the benefit of a party to the submission.

The court will not make an order under the 1 & 2 Vict. c. 110, for payment of money directed to be paid by an award, except in a case where an attachment would have been granted.

A dispute between A and B, two shipowners, as to a collision, was, by agreement, referred; the agreement providing that “all such disputes and differences, claims, demands, and damages in respect thereof, should be referred to the arbitrators;” and that “all the costs and charges in and about the submission, the reference, and award, should be in the discretion of the arbitrators.” The arbitrators ordered “that all disputes between the parties touching the matters in difference, should cease and determine;” and they further ordered that A should pay, “for the damages and costs incurred by B in consequence of the collision, 72*l.* 6*s.* ;” and they further ordered that “the arbitrators’ charges and expenses attending the reference, amounting to 62*l.* 14*s.* 10*d.*, should be borne in equal proportions by A and B; and that the said sums of 72*l.* 6*s.* and 62*l.* 14*s.* 10*d.*, making together 135*l.* 0*s.*

¹ 13 Common Bench Reports, 276.

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10d., should be paid, within ten days from the execution of the award, to C." The court refused to make a rule, under the 1 & 2 Vict. c. 110, s. 18, ordering A to pay the 72. 6s. to B, there being nothing on the face of the award to show how the payment to C was to enure as a payment for the benefit of B; although there was an affidavit stating that C was agent for B's vessel, and acted as his agent in the matter of the arbitration, and that the money was directed to be paid to him as such agent.

Semble, that the award did not sufficiently dispose of "the costs and charges in and about the submission, reference, and award."

By articles of agreement made the 20th of June, 1851, between William Laing, of Leith, one of the owners of the steamship *Britannia*, of the one part, and Edward Todd, of North Shields, owner of the ship *Ann and Elizabeth*, of the other part, reciting that "divers disputes and differences have arisen between the said parties hereto, touching a collision which took place between their respective vessels, on or about the 22d of December last, in the river Tyne; each of the said parties blaming the other, and claiming compensation for the damage sustained by their said vessels," — in order to put an end to such disputes and differences, and to ascertain, settle, and adjust all accounts, claims, demands, and damages in respect thereof, it was agreed as follows — "That all such disputes and differences, claims, demands, and damages as aforesaid, and all other controversies and differences now existing between us, the said parties hereto, shall forthwith be referred to the arbitration and determination of John Rayne, of Newcastle, shipowner, and William Richmond, of North Shields, shipowner, and such third person as they the said John Rayne and William Richmond shall by a memorandum in writing under their hands, indorsed or subscribed on these presents, appoint, or of any two of them; so as the said arbitrators, or any two of them, make their award in writing concerning the matters aforesaid, and all claims and demands relating thereto, under their hands, on or before the 1st of November next, or on or before such further day or days as the said arbitrators, or any two of them, shall, by writing on these presents, from time to time appoint; and that this submission, and the award to be made thereupon, shall be made a rule of Her Majesty's Court of Common Pleas at Westminster; and that the said arbitrators, or any two of them, may proceed *ex parte*, in case of the non-attendance of either of the said parties, or of the non-production of any document, books of account, or other written evidence, after such attendance or production has been required by notice in writing, under the hands of the said arbitrators, or any two of them, delivered to the said parties respectively, or either of them, two clear days before the time appointed for such attendance or production; and that all the costs and charges in and about this submission, the reference, and attendance of witnesses thereupon, and the award of the said arbitrators, or any two of them, shall be in the discretion of the said arbitrators, or any two of them, and shall be paid and satisfied pursuant to their award; and it is also agreed that the said arbitrators, or any two of them, shall have full power to examine the parties and their witnesses on oath to be administered by any one of the said arbitrators."

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The arbitrators named in the above submission, duly appointed "John Wright, of North Shields, shipowner, the third person, to whom, together with themselves, all the within named matters in difference should be referred."

Two of the arbitrators, namely, William Richmond and John Wright, on the 31st of January, 1852, — the time for making it having been duly enlarged, — made an award as follows: — "We order and award, that all disputes whatsoever depending between the said William Laing and Edward Todd, touching the matters in difference, shall cease and determine. And we do further order and award, that the said William Laing, his heirs, executors, or administrators, shall and do pay, or cause to be paid, for the damages and costs incurred by the said Edward Todd in consequence of the collision hereinbefore mentioned between the said vessels *Britannia* and *Ann and Elizabeth*, the sum of 72*l.* 6*s.* And we do further order and award, that the remaining portion, constituting the aforesaid arbitrators' charges and expenses attending the said reference, amounting to 62*l.* 14*s.* 10*d.*, shall be borne in equal proportions, share and share alike, by the said William Laing and Edward Todd, their heirs, executors, or administrators. And we do hereby further award, that the said sums of 72*l.* 6*s.*, and 62*l.* 14*s.* 10*d.*, making together the sum of 135*l.* 0*s.* 10*d.*, shall be paid, within ten days from the execution hereof, to Matthew Poppelwell, of North Shields aforesaid, surveyor."

The agreement of submission having been made a rule of court, and one Lowrey having been duly appointed the attorney of Edward Todd and Matthew Poppelwell, to demand and receive the 72*l.* 6*s.* so awarded as above mentioned, and also the attorney of the arbitrators, to demand and receive the 62*l.* 14*s.* 10*d.* for the expenses of the reference; and Laing having been personally served with true copies of the rule, award, and powers of attorney respectively; and the 72*l.* 6*s.*, and 31*l.* 7*s.* 5*d.* (being a moiety of the expenses of the reference,) having been duly demanded of him by Lowrey, as such attorney, and those sums remaining unpaid,

J. Addison, on a former day in this term, moved for a rule calling upon Laing to show cause why he should not forthwith pay to Todd, or to Lowrey, his attorney, the sum of 72*l.* 6*s.*, pursuant to the award and rule, with costs. He moved upon an affidavit of Lowrey and others showing that the money had been duly demanded, and had not been paid; and also upon an affidavit of Matthew Poppelwell stating that he, the deponent, was the agent of Todd, the owner of the *Ann and Elizabeth*, and that, as such agent, he was acting for and on behalf of Todd in the matter of this arbitration; that he, the deponent, was the same Matthew Poppelwell named in the award as the party to whom Laing was ordered to pay, or cause to be paid, the 72*l.* 6*s.* for the damages and costs incurred by Todd in consequence of the collision between the *Britannia* and the *Ann and Elizabeth*; that he, the deponent, took up the award on the part of Todd; and that the said sum of 72*l.* 6*s.* was, as he, the deponent, verily believed, so directed as aforesaid to be paid to him, the depo-

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ment, as the agent of and on behalf of Todd, and for the sole use and benefit of Todd, and for no other use whatever.

[CRESSWELL, J. The difficulty is, that the award directs the money to be paid to Poppelwell, it not appearing on the face of the award that Poppelwell is Todd's agent.]

The result of the authorities is, that an award of a sum of money to be paid to a third person, is good, where it appears (as it does here by affidavit) that it is for the benefit of one of the parties to the reference. Com. Dig. Arbitrament, E. 7; *Bird v. Bird*, 1 Salk. 74; *Adcock v. Wood*, 6 Exch. 815; s. c. 6 Eng. Rep. 570; *Wood v. Adcock*, 7 Exch. 468; s. c. 9 Eng. Rep. 524.

[JERVIS, C. J. If an action were brought upon the award, Todd would be plaintiff; and the breach would be, nonpayment of the money awarded to Poppelwell. If we were to make an order under the statute 1 & 2 Vict. c. 110, s. 18, Todd would have a judgment against Laing, without any award directing payment to him; and, on the other hand, an order to pay Poppelwell, would be an order to pay a stranger.]

The rule may go in the alternative.

[JERVIS, C. J. And, suppose no cause is shown, how is it to be made absolute?]

Then, as to the moiety of the expenses of the reference.

[JERVIS, C. J. There is a still greater difficulty as to that. The arbitrators cannot have a judgment for their costs. That would be pushing to a very alarming extent a practice which this court has intimated an opinion has already been carried too far. See *Creswick v. Harrison*, 10 Com. Bench Rep. 441; s. c. 1 Eng. Rep. 384.]

The rule was granted calling on Laing to pay the 72*l*. 6*s*. to Todd

Hugh Hill now showed cause. This award being bad upon the face of it, the court will not enforce it in this way. It orders Laing to pay a sum of money to a stranger,—one who does not appear, either by the agreement of reference, or by the award, to be in any way connected with either of the parties. The arbitrators have also exceeded their authority, in awarding as to Todd's costs; or they have fallen short of their duty, in omitting to decide any thing as to Laing's costs. The award is altogether bad. In *Robinson v. Henderson*, 6 M. & S. 276, the award found that the sum of 250*l*. was due from the defendants to the plaintiffs, and that, out of the said sum, the defendants should pay to the arbitrators 94*l*., being the expenses of preparing the agreement of reference and their award, and for their charges, trouble, and attendance on the reference and arbitration, and certain costs, which they awarded to be paid to the solicitors of the plaintiffs in respect of certain actions mentioned in the agreement of reference, leaving the sum of 136*l*., which they awarded to be paid to the plaintiffs; and it was held, that the award was void for uncertainty, in directing a sum in gross to be paid to the arbitrators for the objects above mentioned, without specifying the particular sum to be appropriated to each object. Here, the award directs a sum in gross to be paid to a stranger,—one who is no otherwise

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shown to be identified with Todd, the party in whose favor the award is made, than by the statement in his affidavit, that he was the agent for the ship, and that he believes the money was ordered to be paid to him as the agent of Todd.

Addison, in support of his rule. The fair interpretation of the award, "for the damages and costs incurred by Todd in consequence of the collision," is, that costs here mean the costs incurred in repairing the ship. The arbitrators never intended to award to either party any costs of the reference; it does not appear that any costs were incurred, except those incurred by the arbitrators themselves.

[*Jervis*, C. J., referred to *Richardson v. Worsley*, 5 Exch. 613. There, an agreement of reference contained a stipulation "that the costs of the agreement, and of the reference and award, should be in the discretion of the arbitrator, and be defrayed as he should direct;" the arbitrator awarded that the defendant should pay a certain sum to the plaintiff, but made no mention of costs; and it was therefore held bad.]

In that case, it did not appear what the sum was awarded for. As to the objection that the 72*l.* 6*s.* is directed to be paid to Poppelwell,—there are many authorities to show that an award to pay money to a stranger is good, where it appears to be for the benefit of the parties; or, unless it appears on the face of the award that it could not be for their benefit. In *Bird v. Bird*, 1 Salk. 74, cited in Com. Dig. Arbitrament, E. 7, the award was, "that the plaintiff and defendant should pay such a sum yearly to A, for the use of Mrs. Bird, their mother." Upon exception taken, that this was to award a thing to be done to a third person, who was a stranger to the submission, and consequently a matter out of the power of the arbitrator, Holt, C. J., was of opinion, that "a general award of money to a stranger was good; for it shall be intended the submittants were bound as trustees, or were liable to pay the sum; and the payment shall be intended for their benefit, unless the contrary appear."¹ That dictum is recognized and acted upon in *Adcock v. Wood*, 6 Exch. 815, s. c. 6 Eng. Rep. 570, which was afterwards affirmed, on error, in *Wood v. Adcock*, 7 Exch. 468, s. c. 9 Eng. Rep. 524, where Patteson, J., in giving judgment, says, "There is a distinction between an award which directs a thing to be done by a stranger, and one which directs a thing to be done to a stranger; and the rule is, that an award directing a party to pay money to a stranger, is not good, unless it be for the benefit of one of the parties to the submission; and the onus of showing that, is thrown on the party seeking to enforce the award. Now, in this case, it is plain, from the language of the award itself, that the payment is intended for the benefit of the plaintiff, because the money is directed to be paid over to him immediately on

¹ "Powell, J., *contra*. It must appear to be for their benefit, and it shall not be so intended unless it does appear; but, in the principal case, he held that it should be intended to be for their benefit, or rather, that it appeared to be so, because the payment was to be for the use of the mother."

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receipt of it. If Sharpe, the arbitrator, to whom the money is directed to be paid, had been the authorized agent of the plaintiff, no doubt the award would have been good. The plaintiff adopts the agency by this action; for, he states in his declaration, that the defendant has not paid the money either to Sharpe or to himself; thereby treating the payment to Sharpe as an act that would discharge the defendant."

[CRESSWELL, J. In that case, it appeared on the face of the award that the payment to Sharpe was for the benefit of the plaintiff. How does that appear here?]

From Poppelwell's affidavit, and Todd's adoption of the agency of Poppelwell, by this motion. In *Snook v. Hellyer*, 2 Chitt. R. 43, it was held, that directing payment to a third person, for the use of the party, is good, even though the person to receive the money do not appear to be invested with any express authority by the party for whom the money was to be paid.

[JERVIS, C. J. There, it appeared on the award that the money was to be paid to the third person for the benefit of the plaintiff.]

If necessary, the court will reject that part of the award which directs the payment to Poppelwell.

[JERVIS, C. J. No. That is the whole substance of the award.]

JERVIS, C. J. I am of opinion that this rule must be discharged. It is too late now to express an opinion as to whether the 18th section of the 1 & 2 Vict. c. 110, was intended to apply to moneys directed to be paid under awards, there having now been a long course of practice so applying it. But an application under the statute cannot be put higher than a motion for an attachment for non-performance of the award; and the courts have repeatedly held that they will not make an order, where the circumstances would not justify them in granting an attachment. The case must be clear and plain. Here I think it is much too doubtful. It is not quite certain upon the face of the award, whether the award of 72*l.* 6*s.* to be paid by Laing "for the damages and costs incurred by Todd in consequence of the collision," means, as Mr. Addison contends, the damages and expenses consequent upon the collision, or whether it applies to the expenses incurred by Todd upon the reference. The latter would seem to be the fair and natural construction; and, if so, Mr. Hill's objection must prevail. At all events, it is extremely doubtful. I also doubt whether we can make an order directing Laing to pay a sum of money to Todd, when the award directs it to be paid to Poppelwell, and there is nothing on the face of the award to show that the payment is for the benefit of Todd. I think this is not a fit case for a proceeding under the statute.

CRESSWELL, J. I am entirely of the same opinion. This is far too doubtful a case to warrant us in granting a rule under the statute, which would have the immediate effect of a judgment, upon which an execution might issue against Laing at the suit of Todd, because he has neglected to pay a sum directed by an award to be

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paid to Poppelwell, who, for any thing that appears on the face of the award, is a perfect stranger. It clearly cannot be done.

WILLIAMS, J. I am of the same opinion. Laing could not be said to have been guilty of a contempt, by not paying Todd the money he was ordered to pay to Poppelwell. That being so, we have no authority to grant this rule.

Rule discharged, with costs.

BOYCE v. HIGGINS.¹

November 11, 1853.

Penalty — Public Health Act — Special case.

The defendant, being one of the proprietors of a public company, and also a member of the local board of health, voted upon a question concerning the company. An action was brought for the recovery of the penalty imposed by the 19th section of the Public Health Act, 11 & 12 Vict. c. 63, s. 19, upon any person voting after being disabled. The plaintiff in the action was a rate-payer of the town:—

Held, that he was not a "party grieved" within the 133d section, and was not entitled to sue.

Quære, whether the defendant was a person disabled within the meaning of the 19th section.

THIS was an action of debt, brought to recover a penalty from the defendant under the Public Health Act, 11 & 12 Vict. c. 63, s. 19. The plaintiff was one of the ratepayers of Margate, to which the Public Health Act had been applied. The defendant was a member of the local board of health, and also one of the company of proprietors constituted for the purpose, *inter alia*, of finishing and completing the pier and harbor of Margate. The declaration alleged that on the 28th September the defendant was a proprietor in the company, and was present as a member of the local board; that a question respecting the company was then pending before the board, and that he voted and incurred the penalty.

Plea, never indebted by statute.

The Public Health Act, 11 & 12 Vict. c. 63, s. 19, enacts, "That no bankrupt, insolvent, or other person not qualified (as required by the act,) shall be capable of being elected (as a member of the board of health); and if any person, after being so elected, shall lose or discontinue to hold his qualification, or shall be declared bankrupt, or shall apply to take the benefit of any act for the relief or protection of insolvent debtors, or shall compound with his creditors, or if any member elected under the act shall accept, or hold any office, or place

¹ 18 Jur. 33; 23 Law J. Rep. (N. S.) C. P. 5; 22 Law Times Rep. 103.

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of profit under the local board of health of which he is a member, or shall in any manner be concerned in any bargain, or contract entered into by such board, or participate in the profit thereof, or of any work done under the authority of this act, in or for the district for which he is a member, then and in every such case such person shall, except in the cases next hereinafter provided, cease to be such member, and his office as such shall thereupon become vacant. And any person, who, not being duly qualified to act as member of the said local board, or who has not made and subscribed the declaration required of him by this act, or who, after being disqualified, or disabled from acting by any provision of this act, shall so act, shall for every such offence be liable to a penalty of 50*l.*, which may be recovered by any person, with full costs of suit, by action of debt. And in such action it shall be sufficient for the plaintiff to prove, in the first instance, that the defendant, at the time when the offence is alleged to have been committed, acted as such member; and the burden of proving qualification, and the making and subscription of the declaration, or negating misqualification by reason of non-residence, or not being seised or possessed of the requisite real or personal estate, or both, shall be upon the defendant. Provided always, that no person, being a proprietor, shareholder, or member of any company or concern established for the supply of water, or for the carrying on of any other works of a like public nature, shall be disabled from being, continuing, or acting as member of the said local board, by reason of any contract entered into between such company or concern, and such board: but no such person shall vote as member of the said local board upon any question in which such company or concern is interested. Provided also, that all acts and proceedings of any person disqualified, disabled, or not duly qualified as aforesaid, or who has not made or subscribed the said declaration, shall, if done previous to the recovery of the last mentioned penalty, be valid and effectual to all intents and purposes whatsoever."

The 133d sect. enacts, "that no proceedings for the recovery of any penalty incurred under the provisions of this act shall be had or taken by any person other than by a party grieved, or (certain other persons) without the consent in writing of her Majesty's Attorney-General first had and obtained.

Channell, Sergt., for the plaintiff. The defendant was a member of a company constituted by stat. 52 Geo. 3, c. 186, the early sections of which show it to be a public company. The defendant, at the time of giving the vote for which the penalty is sought to be recovered, was a member of that company; and a question concerning that company being before the board, he was disabled from voting by the 19th sect. of the Public Health Act, and having nevertheless voted renders himself liable to the penalty imposed by that section. The word "disabled" meets the case of a person who, though a member of the board, is forbidden to vote on a particular question.

[JERVIS, C.J. Does not the 19th sect. say, that bankrupts shall be

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disqualified ; men contracting with the board shall be disabled ; but members of public companies shall not be disabled, but may act as members of the board, but shall not vote upon questions in which those companies are interested ? But how do you bring the plaintiff within the 133d section so as to make him a party grieved ?]

He is a ratepayer, and so interested in the undertaking.

[MAULE, J. He is only a party grieved as being one of the public, and having a public grief.]

Phipson, for the defendant, was not called upon.

JERVIS, C. J. We need not discuss the other point. The plaintiff, not being a party grieved, and not having the permission of the Attorney-General, cannot maintain the action.

Judgment for the defendant.

CLULEE v. BRADLEY.¹

November 23, 1853.

Change of Venue.

A plaintiff cannot change the venue upon a common affidavit, after obtaining time to plead upon the terms of taking short notice of trial.

In this case Manisty had obtained a rule calling upon the plaintiff to show cause why the venue should not be changed from Middlesex to Warwickshire. It was by way of appeal from a decision of Cresswell, J., at chambers, who refused to make an order to that effect. The defendant had obtained time to plead upon the usual terms of taking short notice of trial. Afterwards, and before issue joined, he applied to have the venue changed, upon an affidavit stating that the cause of action arose wholly in Warwickshire, and all the witnesses resided there.

Phipson now showed cause. No. 18 of the new rules under the Common Law Procedure Act, says that "No venue shall be changed without a special order of the court or a judge, unless by consent of the parties." In the case of *De Rothschild v. Shilston*, 8 Exch. 503 ; s. c. 20 Eng. Rep. 517 ; it was referred to a committee of the judges to report what practice should be adopted in consequence of the above rule ; and they reported — First, that in their opinion it is

¹ 22 Law J. Rep. (N. S.) C. P. 8 ; 18 Com. Bench Rep. 604 ; 2 Com. Law Rep. 1.

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more convenient, as a general rule, that the application to change the venue, by rule or summons, may be made before issue joined, provided that this shall not prejudice either party from applying, after issue is joined, to lay the venue in another county, if it shall appear that it may be more conveniently tried in such county. Secondly, that a defendant, on his affidavit to obtain the rule *nisi* to change venue, or in support of a summons for that purpose, before issue joined, should state all the circumstances on which he means to rely as the ground for the change of venue; but that he may, if he pleases, rely only on the fact that the cause of action arose in the county in which he seeks to have the venue changed, which ground shall be deemed sufficient, unless the plaintiff shows that the cause may be more conveniently tried in the county in which it was originally laid, or other good reason why the venue should not be changed. Under the old practice, the defendant was not allowed to change the venue after being put under terms to try at the next sittings. After the statute he might, upon a special affidavit, change the venue after issue joined, — *v. Fisher*, 2 Dowl. 22; *Haythorn v. Bush*, 2 Dowl. 240. So that, formerly, the venue might have been changed on the common affidavit before issue joined, and on a special affidavit after issue joined. And the rule laid down in *De Rothschild v. Shilston* means, that before issue joined a party may rely upon the mere fact of the cause of action having arisen in the county to which he wishes to have the venue changed, or upon special circumstances; and, in the latter case, the application will be judged of as it would under the old practice after issue joined. And, under that, it would have been necessary to state, in addition to the fact of all the witnesses residing in the other county, that it was necessary that he should call them. *Crompton v. Stewart*, 2 C. & J. 473; *Parmiter v. Otway*, 3 Dowl. 66; *Thornhill v. Oastler*, 7 Scott, 272; — *v. Gray*, Barnes 49. As far as this is the common affidavit, it is too late; as a special affidavit, it is insufficient. *Hans v. Pawlit*, 5 Com. B. 806; *Smallcomb v. Williams*, 7 Com. B. 77.

Manisty, in support of the rule. There is now no such thing as a common order. There is now a special application, founded on a common affidavit, or on a special affidavit. This is a common affidavit, and, under the rule in *De Rothschild v. Shilston*, that is sufficient, after the defendant has had time to plead on terms.

MAULE, J. This is an application, by a party having consented to try at Middlesex, to change the venue to Warwickshire upon one ground, namely, that the cause of action arose in Warwickshire. He has a common law right to change the venue to that county; but he parts with that right upon having time given him to plead. The above is the only ground; and it is not stated that there are any witnesses, or that the cause can be tried more cheaply in Warwickshire.

WILLIAMS, and TALFOURD, JJ., concurred.

Popham v. Jones.

POPHAM and another v. JONES.¹

January 20, 1853.

Apprentice — Construction of Indenture — Service of two Persons not in Partnership.

In covenant against a surety on an indenture of apprenticeship of A, to serve B and C, the defendant pleaded that there never were or was any service or services for A to perform to or for the plaintiffs jointly.

To this plea the plaintiffs, setting out the indenture, whereby the defendant covenanted for the service of A as apprentice to "B, of, &c., surgeon, and C, of, &c., surgeon and apothecary," replied, that, at the time of the execution of the indenture, the plaintiffs were not in partnership, nor did they carry on business jointly or on the same premises, but that they carried on business wholly separate and apart from and independent of each other, which the defendant at the time of executing the indenture well knew, and that the plaintiffs never represented to the defendant that they should carry on business in partnership:

Held, that this replication was bad in substance.

Semble, that the proper course would have been, to take issue on the plea, if the plaintiffs intended to rely on the service of the one as being a constructive service of both masters.

COVENANT against a surety on an indenture of apprenticeship.

The declaration stated, that, by an indenture made on the 2d of March, 1852, between the plaintiffs of the first part, the defendant of the second part, and Frederick Thomas Jones, son of the defendant, of the third part, the plaintiffs, in consideration of 30*l.* to them paid by the defendant, and also in consideration of the further sum of 110*l.* to be also paid to the plaintiffs by the defendant at the times and in the manner thereafter mentioned, and also in consideration of the services of the said F. T. Jones, and of the covenants and agreements thereafter entered into by the defendant and F. T. Jones, agreed to take and receive the said F. T. Jones to serve them after the manner of an apprentice, and during the term of five years; and, in consideration of such acceptances as aforesaid, the said F. T. Jones, with the consent of his father, the defendant, did put, place, and bind himself apprentice to the plaintiffs, to learn their art and profession with them after the manner of an apprentice, to serve them for the term of five years from the 27th of October, 1851, during all which time he, the said F. T. Jones, should and would faithfully, diligently, and honestly serve them, the plaintiffs, all their secrets keep, and their lawful commands everywhere gladly do, and should not nor would not unlawfully absent himself from the service of the plaintiffs by day or by night without their leave, and would in all matters and things whatsoever during the said term conduct and behave himself as a good, true, and faithful apprentice ought to do, towards the plaintiffs, and towards all their patients and customers; and the defendant did thereby covenant and agree with the plaintiffs, their executors, ad-

¹ 13 Common Bench Reports, 225.

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ministrators, and assigns, that he, the defendant, should and would well and truly pay unto the plaintiffs, their executors, administrators, and assigns, the sum of 110*l.* in the manner following, that is to say, 22*l.* on the 29th of September, 1852, and the like amount on the same day in every year until and including the 28th of September, 1856; and the defendant did thereby further covenant and agree to and with the plaintiffs, that he, the said F. T. Jones, should and would faithfully, diligently, and honestly serve the plaintiffs as their apprentice during the said term. Breach, that although the plaintiffs had performed all things by them to be performed, yet the defendant did not pay to the plaintiffs the said sum of 22*l.* on the 29th of September, 1852; nor had the said F. T. Jones faithfully, diligently, and honestly served the plaintiffs as their apprentice, according to the defendant's said covenant, &c.

Plea, to the second breach, that there never were or was any services or service for the said F. T. Jones to perform to or for the plaintiffs jointly.

Replication, — that the indenture in the declaration mentioned was and is in the words and figures following, that is to say, — “ This indenture, made, &c., between R. H. Popham, of 2 Caledonian Place, in the county of Middlesex, surgeon, and W. H. Popham, of No 9 Tonbridge Place, New Road, in the same county, surgeon and apothecary, of the first part, Evan Jones, (the defendant,) of &c., of the second part, and F. T. Jones, son of the said Evan Jones, of the third part, — witnesseth, that the said R. H. Popham and W. H. Popham, for and in consideration of the sum of 30*l.* to them in hand paid by the said Evan Jones at the time of the execution of these presents, and also in consideration of the further sum of 110*l.* to be also paid to the said R. H. Popham and W. H. Popham by the said Evan Jones at the times and in the manner hereinafter mentioned; and also in consideration of the services of the said F. T. Jones, and of the covenants and agreements hereinafter entered into by the said Evan Jones and F. T. Jones, they the said R. H. Popham and W. H. Popham do by these presents agree to take and receive the said F. T. Jones to serve them after the manner of an apprentice for and during the term of five years now next ensuing; and, in consideration of such acceptances as aforesaid, the said F. T. Jones, with the consent of his father, the said Evan Jones, testified by his executing these presents, doth put, place, and bind himself apprentice to the said R. H. Popham and W. H. Popham, to learn their art and profession with them, (after the manner of an apprentice,) to serve them for the term of five years from the 27th of October, 1851, (having spent three months' probationary term before the execution of these presents,) during all which time he, the said F. T. Jones, shall and will faithfully, diligently, and honestly serve them, the said R. H. Popham and W. H. Popham, all their secrets keep, and their lawful commands everywhere gladly do, and shall not nor will not unlawfully absent himself from the service of the said R. H. Popham and W. H. Popham, by day or by night, without their leave, nor unduly nor negligently spend or waste any of the moneys, effects,

goods, or chattels of the said R. H. Popham and W. H. Popham, with which he shall at any time be intrusted, or which shall be delivered to or placed in the hands or custody of him, the said F. T. Jones, by the said R. H. Popham and W. H. Popham, or by any other person or persons on their account during the said term; and shall and will truly and forthwith account for, deliver, and pay to the said R. H. Popham and W. H. Popham, their executors, administrators, or assigns, all such sum or sums of money and other things as he, the said F. T. Jones shall receive, have, or be intrusted with, or which shall come to his hands or possession for or on account of the said R. H. Popham and W. H. Popham; and also shall and will, in all matters and things whatsoever during the said term, conduct and behave himself, as a good, true, and faithful apprentice ought to do, towards the said R. H. Popham and W. H. Popham, and towards all their patients and customers. And the said R. H. Popham and W. H. Popham, in consideration of the sum of 110*l.* so covenanted to be paid as herein appears, and also of the services of the said apprentice, do hereby covenant and agree to and with the said Evan Jones, and also with the said F. T. Jones, in manner following, that is to say, that the said R. H. Popham and W. H. Popham shall and will during the said term of five years, to the best of their power, knowledge, and ability, teach and instruct, or cause to be taught and instructed, the said F. T. Jones in the said profession and art of surgeon and apothecary, and all things thereto belonging, as they now carry on the same; and shall and during the said term find and provide for him, the said F. T. Jones, good and sufficient meat, drink, and lodging fitting for an apprentice. And the said Evan Jones, for the several considerations aforesaid, doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said R. H. Popham and W. H. Popham, their executors, administrators, or assigns, that he, the said Evan Jones shall and will well and truly pay unto the said R. H. Popham and W. H. Popham, their executors, administrators, or assigns, the sum of 110*l.* in the manner following, that is to say, the sum of 22*l.* on the 29th of September, 1852, and the like amount on the same day in every year until and including the 29th of September, 1856. And the said Evan Jones doth hereby, for himself and his heirs, executors, and administrators, further covenant and agree to and with the said R. H. Popham and W. H. Popham, their executors or administrators, that he, the said F. T. Jones, shall and will faithfully, diligently, and honestly serve the said R. H. Popham and W. H. Popham as their apprentice during the said term, and, further, that the said Evan Jones, his executors, administrators, or assigns, shall and will from time to time, and at all times during the said term of five years, at his or their own costs and charges, find and provide, or cause to be found and provided, proper, sufficient, and suitable clothes, washing, and pocket-money, (and, in case of continued sickness, nurses and attendance,) and all others necessaries, for the said F. T. Jones. And, for the true performance of all the said covenants and agreements, all the said parties bind themselves unto each other by these presents. And it is

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hereby further covenanted that the said R. H. Popham and W. H. Popham shall give to the said F. T. Jones sufficient time to attend lectures requisite for the qualification of a surgeon and apothecary, during the fourth and fifth years of his apprenticeship." Averment, that, before and at the time of the execution of the said indenture by the plaintiffs and the defendant, they, the plaintiffs, were not in partnership, nor did they carry on business together or in partnership, or in any manner jointly, or on the same premises; but they carried on business wholly separate and apart from and independent of each other,—which the defendant, before and at the time of his executing the said indenture, well knew; and that they, the plaintiffs, never represented to the defendant that they did or should carry on business together or in partnership, or in any manner jointly.

To this replication the defendant demurred generally; the point stated in the margin being "that the replication confesses the truth of the fourth plea, and that the new matter which it alleges can in no respect alter the meaning of the deed declared on."

Unthank, in support of the demurrer. The replication is manifestly bad. The real question is, whether the indenture imposes upon the apprentice any liability to serve one of the plaintiffs separately. He clearly could not be bound to serve the two, except in their joint trade. How is the apprentice to perform the covenant? The point was raised, but left in doubt, in *Lloyd v. Blackburn*, 9 M. & W. 363. Ordinarily, an apprentice is not bound to serve the executor of the master. *Baxter v. Burfield*, 2 Stra. 1266; and the master's discontinuing one of several trades has been held to discharge the apprentice, and, consequently, his surety. *Ellen v. Topp*, 6 Exch. 424; s. c. 4 Eng. Rep. 412.

[MAULE, J. Supposing the plaintiffs to be right in their construction of the indenture, it may be that a service of one of the masters would be a service of both. The proper course would seem to be, to take issue on the plea. I think the plaintiffs should amend.]

Raymond, for the plaintiffs, elected to amend.

Rule accordingly.

EARL OF MOUNTCASHELL v. BARBER.¹

November 21, 1853.

Club Committee — Liability to Contribution.

Where the members of a club, at a general meeting, authorize the members of the committee of management to borrow money on their own responsibility, but with the guarantee of the

¹ 23 Law J. Rep. (N. S.) C. P. 43; 22 Law Times Rep. 134.

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society for its repayment, and the money is borrowed and placed to the account of the committee, and one of the committee draws checks upon the bank in which the money is, and otherwise so conducts himself as to show his knowledge of the whole transaction, he is liable to an action for contribution by another member of the committee from whom the lender has received the whole sum.

THIS was an action of debt for money paid for the use of the defendant, and for money due on an account stated.

Pleas. 1. Never indebted. 2. Payment. 3. A set-off.

The case was tried at Guildhall, before Jervis, C. J., when a verdict was taken for the plaintiff for 96*l.* 3*s.* subject to the opinion of the court on the following case.

The plaintiff and defendant were members of the committee of management of the Colonial Club, consisting of many members who paid annual subscriptions. The society had no deed; but there were rules for its government, one of which was, that there should be selected from the members at large thirty-six persons, to be called the committee of management.

The plaintiff became a member of the committee before the defendant, who became one on the 2d December, 1841, and both continued members until July, 1843, when the club broke up. In March, 1842, the club was about 3,000*l.* in debt. On the 16th of that month there was an ordinary meeting of the committee, of which the defendant was chairman, and at which a Mr. Morson gave a notice of motion for the Wednesday following "to call the attention of the committee to (*inter alia*) the financial difficulties of the society." The defendant attended the next meetings, having been shortly before elected a member of the house-committee and wine-committee, which gave orders for wine and other supplies. On the 28th April the defendant attended a meeting, at which it was resolved "that the removal of the Colonial Society to a more commodious house having rendered expedient an immediate loan to the society of 3,000*l.*, the members of the society be invited to pledge themselves to the managing committee that, in consideration of the committee rendering itself liable to this loan, they will severally, but not jointly, guarantee to advance to the committee, eleven months from this date, the sums to which their names are affixed; that such subscription shall be regarded as loans to the society, for which the subscribers shall receive society debentures, and such subscriptions shall be called for only in case of there not being at the disposal of the committee sufficient funds of the society to repay the above-named loans; and such debentures shall be for 10*l.* each and carry five per cent. interest, to be deducted from the annual subscriptions, (with other provisions as to the debentures.)

At subsequent meetings the defendant also attended, and took part and examined the accounts.

On the 1st of June, 1842, the defendant attended a general meeting of the society, at which it was resolved "that a loan of 4,000*l.* is necessary to free the society from outstanding liabilities, and place the establishment of the society on a suitable footing in their new house; and that the committee be empowered to raise the sum on

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the guarantee of the society in the manner most advantageous to the society ; and that the meeting further pledges itself to meet heartily the views of the committee in subscribing to the proposed debentures."

The defendant attended a meeting of the committee and also a general meeting of the society on the 15th June, 1842, at which the above resolution was discussed and again passed. The plaintiff and defendant attended a meeting of the committee on the 27th July, 1842, at which Captain Macdonald and themselves signed a check on the London Joint-Stock Bank for 15*l.* servants' wages.

There was a meeting of the committee on the 3d August, 1842, at which the defendant was not present.

At the trial of the cause evidence was given of what took place at that meeting, (subject to the opinion of the court as to its admissibility,) to the effect that, the secretary having reported that he had been requested by Mr. Hopkinson to state that the sum of 4,000*l.* would be placed to the credit of the society at the Commercial Bank of London, on the manager receiving a letter containing a request to that effect, and containing a copy of the resolution of the committee authorizing the loan, the following resolution was adopted and ordered to be acted upon immediately:—"In conformity with the resolution passed at the general meeting on the 15th July, 1842, resolved that the sum of 4,000*l.* be borrowed at 5*l.* per cent. from the Commercial Bank in the name of this society, and that this sum be immediately placed to the credit of the committee; and that the account of the society be transferred to the Commercial Bank." The society had before banked with the London Joint-Stock Bank, and had at that time a balance there, which was transferred to the Commercial Bank on the 1st September, 1842.

There was also given in evidence, (subject to the same objection,) a resolution by the same meeting, "That the following checks, having been referred from the house-committee, were ordered to be made out for signature immediately on the intended loan for paying off the society's liabilities being obtained. Howell, rent and dilapidations, 630*l.* Violet for wine, 139*l.*"

The next day the secretary sent a letter, (also admitted subject to the same objection,) purporting to be by the direction of the committee, to the Commercial Bank, informing them of the resolution of the day before, and also stating that the signatures of the members of the committee, by three of whom, as well as the secretary, all their checks were signed, would be forwarded to them in a few days, and also a check for the society's balance at the London Joint-Stock Bank. An account was accordingly opened; and at a meeting of the committee on the 12th August, 1842, upon the secretary stating that the Commercial Bank wanted the signatures of the members, that they might recognize them when checks were drawn, the defendant and three other members then present gave their signatures for that purpose, and subsequently the plaintiff and four others did the same; and checks were signed by the defendant and two others for the expenses of the club. An action was afterwards brought by the Commercial Bank against the plaintiff for the

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4,000*l.*, and a Judge's order was made for payment of that sum by him. The defendant and some other members contributed 100*l.* each towards paying this and other debts of the society, and the plaintiff received in the whole 2,500*l.*

It was to be taken, for the purpose of assessing the amount payable by the defendant, that there were twenty-six members of the committee of management of the society, including the plaintiff and the defendant. The court were to draw any inference which a jury might draw, and the questions for the opinion of the court were, —

1. Was the evidence to which objection was taken, or any part of it admissible?

2. Upon the whole of the case, was the defendant liable to pay any thing to the plaintiff for contribution as a co-contractor; and if so, whether any and what sum of money was due from the defendant to the plaintiff, taking into consideration the payments made by the defendant?

The verdict for the plaintiff was to stand, or be altered, or a verdict was to be entered for the defendant, according as the court should think right.

Lush, for the plaintiff. The effect of the resolutions, together with the conduct of the defendant, who took an active part in the matter, and with others drew checks upon the Commercial Bank, after the money had been placed to the account of the committee, is to make him liable.

Bramwell, Q. C., for the defendant. The resolution of the 1st of June gave no more authority to individual members to pledge each other's credit than they had before.

[MAULE, J. It shows that, it being necessary that the committee should be authorized to borrow jointly on the responsibility of each, that agreement was come to without which they could not have done it. Suppose twelve people say to a thirteenth, we are going to borrow money, and the thirteenth borrows it from the fourteenth, and the twelve treat it as money borrowed by themselves, that would be evidence to show that they authorized the borrowing of it.]

The resolutions only contemplate a loan, which was not to be entered into until they got a guarantee from the society. The defendant might have objected to the guarantee, and would not then have been bound, unless it were shown that they all afterwards ratified the borrowing.

JERVIS, C. J. There is really only one question in this case. The question of the admissibility of the evidence and of liability is the same. I think there is evidence before the loan to make the defendant liable; but, if not before the loan, there is abundant evidence of his having ratified.

MAULE, J. This is a very clear case. The person most active and cognizant of the whole transaction was the defendant, and it would

Solomon v. Todd.

have been more easy for the Commercial Bank to have sued him than any one else.

WILLIAMS, J., and TALFOURD, J., concurred.

SOLOMON v. TODD.¹

November 25, 1853.

Setting aside a Verdict.

Where it is clear that one side or the other has committed perjury, the court will not disturb the finding of the jury.

THIS was an action for goods sold and delivered, tried before Cresswell, J. The plaintiff was a merchant in the minories; the defendant a part owner of a vessel. The action was brought to recover the balance of an account originally amounting to 62*l.* 11*s.*, of which 27*l.* 1*s.* had been paid. On the part of the plaintiff it was proved that the invoice of the goods in question was made out in the names of the captain and owners; that it was shown to the defendant, who went out in the vessel to Rio; that he examined the goods, and that the 27*l.* 1*s.* received in part payment was the defendant's money. The case for the defendant was, that the goods had been purchased by the captain, who had died on the voyage, and that the owners had nothing to do with them; that the money paid had been lent by the defendant to the captain; that after the captain's death the defendant, out of kindness to the plaintiff, told the agent at Rio that he had better try to dispose of the goods. The jury found a verdict for the defendant.

Byles, Sergt., now moved for a rule calling upon the defendant to show cause why the verdict should not be set aside, as being against evidence.

CRESSWELL, J. I think it quite clear that one side or the other committed perjury, and the jury found for the defendant. If a new trial were granted, you would have the same witnesses again. In such a case the court will not disturb the finding of the jury.

Rule refused.

¹ 23 Law Times Reports, 135.

Lewis v. Collard.

LEWIS v. COLLARD.¹

November 25, 1853.

Attorney — Negligence.

A trader petitioned the Court of Bankruptcy, under the 211th section of 12 & 13 Vict. c. 106; and an order for the official assignee to take possession of his estate, was made under the 213th section. An attorney, having notice of these proceedings, upon an assurance from the defendant, a creditor, that all the creditors of the bankrupt would concur, and being instructed by him, drew a deed of settlement:—

Held, that as such deed might have been operative if all the creditors had concurred, the attorney was right in drawing the deed.

THIS was an action brought by the plaintiff an attorney, to recover the costs of preparing a deed of settlement of the estate of one Spratt. At the time of the deed being drawn, Spratt had petitioned the Court of Bankruptcy under the 211th section; an official assignee had been appointed; and an order had been made under the 213th section, directing that the estate should be possessed and received by him. The plaintiff, having had notice of these proceedings, was applied to by the defendant to draw the deed of settlement, and was told by him that he had no doubt all the creditors would consent. The jury found a verdict for the plaintiff.

James, Q. C., now moved, upon leave reserved, for a rule to enter the verdict for the defendant, if there was any evidence to go to the jury of gross ignorance on the part of the plaintiff. The estate vested on the petition of Spratt, (which is an act of bankruptcy,) and the order, under which the estate was "possessed and received by the official assignee;" and after that, Spratt had no power to execute a deed of settlement.

[CRESSWELL, J. No adjudication had been filed, and, if all the creditors had consented, none could.]

He ought not to have prepared the deed until he was satisfied all the creditors would concur.

[CRESSWELL, J. But he was told by the defendant all would concur. And Mr. Collard said the reason of their not concurring was, that, at the meeting of the creditors called to consider the matter, some of them were much wiser than the plaintiff, and the deed would be of no avail.]

MAULE, J. But even if the estate had vested, the Court of Bankruptcy would scarcely interfere, if all the creditors, or, supposing only one creditor, if that one, had agreed to the settlement.]

The attorney was not justified in preparing the deed until he had ascertained that.

¹ 28 Law J. Rep. (N. S.) C. P. 32; 21 Law Times Rep. 135.

Popham v. Jones.

ministrators, and assigns, that he, the defendant, should and would well and truly pay unto the plaintiffs, their executors, administrators, and assigns, the sum of 110*l.* in the manner following, that is to say, 22*l.* on the 29th of September, 1852, and the like amount on the same day in every year until and including the 28th of September, 1856; and the defendant did thereby further covenant and agree to and with the plaintiffs, that he, the said F. T. Jones, should and would faithfully, diligently, and honestly serve the plaintiffs as their apprentice during the said term. Breach, that although the plaintiff had performed all things by them to be performed, yet the defendant did not pay to the plaintiffs the said sum of 22*l.* on the 29th of September, 1852; nor had the said F. T. Jones faithfully, diligently, and honestly served the plaintiffs as their apprentice, according to the defendant's said covenant, &c.

Plea, to the second breach, that there never were or was any services or service for the said F. T. Jones to perform to or for the plaintiffs jointly.

Replication,—that the indenture in the declaration mentioned was and is in the words and figures following, that is to say,—“This indenture, made, &c., between R. H. Popham, of 2 Caledonian Place, in the county of Middlesex, surgeon, and W. H. Popham, of No. 9 Tonbridge Place, New Road, in the same county, surgeon and apothecary, of the first part, Evan Jones, (the defendant,) of &c., of the second part, and F. T. Jones, son of the said Evan Jones, of the third part,—witnesseth, that the said R. H. Popham and W. H. Popham, for and in consideration of the sum of 30*l.* to them in hand paid by the said Evan Jones at the time of the execution of these presents, and also in consideration of the further sum of 110*l.* to be also paid to the said R. H. Popham and W. H. Popham by the said Evan Jones at the times and in the manner hereinafter mentioned; and also in consideration of the services of the said F. T. Jones, and of the covenants and agreements hereinafter entered into by the said Evan Jones and F. T. Jones, they the said R. H. Popham and W. H. Popham do by these presents agree to take and receive the said F. T. Jones to serve them after the manner of an apprentice for and during the term of five years now next ensuing; and, in consideration of such acceptances as aforesaid, the said F. T. Jones, with the consent of his father, the said Evan Jones, testified by his executing these presents, doth put, place, and bind himself apprentice to the said R. H. Popham and W. H. Popham, to learn their art and profession with them, (after the manner of an apprentice,) to serve them for the term of five years from the 27th of October, 1851, (having spent three months' probationary term before the execution of these presents,) during all which time he, the said F. T. Jones, shall and will faithfully, diligently, and honestly serve them, the said R. H. Popham and W. H. Popham, all their secrets keep, and their lawful commands everywhere gladly do, and shall not nor will not unlawfully absent himself from the service of the said R. H. Popham and W. H. Popham, by day or by night, without their leave, nor unduly nor negligently spend or waste any of the moneys, effects,

goods, or chattels of the said R. H. Popham and W. H. Popham, with which he shall at any time be intrusted, or which shall be delivered to or placed in the hands or custody of him, the said F. T. Jones, by the said R. H. Popham and W. H. Popham, or by any other person or persons on their account during the said term; and shall and will truly and forthwith account for, deliver, and pay to the said R. H. Popham and W. H. Popham, their executors, administrators, or assigns, all such sum or sums of money and other things as he, the said F. T. Jones shall receive, have, or be intrusted with, or which shall come to his hands or possession for or on account of the said R. H. Popham and W. H. Popham; and also shall and will, in all matters and things whatsoever during the said term, conduct and behave himself, as a good, true, and faithful apprentice ought to do, towards the said R. H. Popham and W. H. Popham, and towards all their patients and customers. And the said R. H. Popham and W. H. Popham, in consideration of the sum of 110*l.* so covenanted to be paid as herein appears, and also of the services of the said apprentice, do hereby covenant and agree to and with the said Evan Jones, and also with the said F. T. Jones, in manner following, that is to say, that the said R. H. Popham and W. H. Popham shall and will during the said term of five years, to the best of their power, knowledge, and ability, teach and instruct, or cause to be taught and instructed, the said F. T. Jones in the said profession and art of surgeon and apothecary, and all things thereto belonging, as they now carry on the same; and shall and during the said term find and provide for him, the said F. T. Jones, good and sufficient meat, drink, and lodging fitting for an apprentice. And the said Evan Jones, for the several considerations aforesaid, doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said R. H. Popham and W. H. Popham, their executors, administrators, or assigns, that he, the said Evan Jones shall and will well and truly pay unto the said R. H. Popham and W. H. Popham, their executors, administrators, or assigns, the sum of 110*l.* in the manner following, that is to say, the sum of 22*l.* on the 29th of September, 1852, and the like amount on the same day in every year until and including the 29th of September, 1856. And the said Evan Jones doth hereby, for himself and his heirs, executors, and administrators, further covenant and agree to and with the said R. H. Popham and W. H. Popham, their executors or administrators, that he, the said F. T. Jones, shall and will faithfully, diligently, and honestly serve the said R. H. Popham and W. H. Popham as their apprentice during the said term, and, further, that the said Evan Jones, his executors, administrators, or assigns, shall and will from time to time, and at all times during the said term of five years, at his or their own costs and charges, find and provide, or cause to be found and provided, proper, sufficient, and suitable clothes, washing, and pocket-money, (and, in case of continued sickness, nurses and attendance,) and all others necessaries, for the said F. T. Jones. And, for the true performance of all the said covenants and agreements, all the said parties bind themselves unto each other by these presents. And it is

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was not within the protection of the act, and was not entitled to notice.

WILLIAMS, J. If the statute applies, the defendant is not a bailiff either *de jure* or *de facto* within it.

TALFOURD, J., concurred.

HARRIS v. THOMPSON.¹

January 11, 1853.

Defamation—Privileged Communication—Proof of Malice.

The plaintiff, the secretary of a company called the Brewers' Insurance Company, being charged with misconduct, was called upon to attend a board of directors for the purpose of explanation, but declined to do so, whereupon the directors, after hearing the nature of the charges, passed a resolution declaring him to have been guilty of gross misconduct, and dismissing him from their service. The defendant, who was a director of that company, and also of another company called the London Necropolis Company, communicated the fact of the plaintiff's dismissal from the service of the former company, "for gross misconduct," at a board meeting of the latter company, and proposed a resolution to dismiss him from his employment as their auditor, and, in answer to an inquiry from the chairman, said that the misconduct consisted in "obtaining money from the solicitors of the company under false pretences, and paying a debt of his own with it;" and, upon the plaintiff's appearing on a subsequent day with his attorney before the board, to meet the charges against him, the defendant refused to go into them. In an action of slander:—

Held, that the communication was privileged, and that the defendant's refusal to go into the charges in the presence of the plaintiff and his attorney, was no evidence of malice that could properly be submitted to the jury; for that, such refusal being consistent with *bona fides*, *bona fides* was to be presumed until the contrary was proved.

SLANDER. The declaration, after the usual averment that the plaintiff was a person of good fame and credit, &c., stated, that, before the time of the committing of the grievances by the defendant as thereafter mentioned, the plaintiff had been the secretary of a certain company, called the Brewers', Distillers', Licensed Victuallers', and General Life and Fire Assurance, and Loan and Endowment Company, but of which said company the plaintiff had ceased to be the secretary at the time of the committing of the grievances by the defendant thereafter mentioned; that, before and at the time of the committing of the grievances by the defendant as thereafter mentioned, Messrs. H, B. & L., who then were solicitors and copartners, had been and were the solicitors of the said last-mentioned company; that, before and at the time of the committing of the grievances by the defendant as thereafter mentioned, the plaintiff was one of the auditors, and the defendant was one of the directors,

¹ 13 Common Bench Reports, 333.

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and one W. J. Voules was another of the directors, and one R. Churchill was the secretary of a certain other company called the London Necropolis and National Mausoleum Company; that, just before the committing of the grievances by the defendant thereafter mentioned, and after the plaintiff had ceased to be the secretary of the said company called the Brewers', Distillers', Licensed Victuallers', and General Life and Fire Assurance, and Loan and Endowment Company, as aforesaid, to wit, on the 23d of February, 1852, a certain board meeting of the directors of the London Necropolis Company was held, at which the defendant and the said R. Churchill and divers other persons were present, and at which said meeting the said W. J. Voules, who was also present, acted as the chairman thereof; and the defendant, at such meeting, moved a resolution that the plaintiff, having been dismissed from the office of secretary to the said Brewers', Distillers', Licensed Victuallers', and General Life and Fire Assurance, and Loan Endowment Company, for gross misconduct, he was no longer fit so to be an auditor of the said London Necropolis and National Mausoleum Company. Breach, that the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving and wickedly and maliciously intending to injure him in his aforesaid good name, fame, and credit, and to cause him to be dismissed from his said office of auditor, and to bring him into public scandal, &c., and to cause it to be suspected and believed by those neighbors and subjects that the plaintiff had been and was guilty of obtaining money under false pretences from the said Messrs. H., B. & L., and to subject the plaintiff to the pains and penalties of this kingdom made and provided against, and inflicted on, persons guilty thereof, theretofore, to wit, on the said 23d of February, 1852, in a certain discourse which the defendant then had at the said board meeting of the directors of the said London Necropolis and National Mausoleum Company, in the presence and hearing of the said W. J. Voules, and R. Churchill, in answer to a certain question, then and immediately after the defendant had moved the resolution thereinbefore mentioned, put to the defendant by the said W. J. Voules, why he the defendant proposed such a resolution, and why the said directors of the said London Necropolis and National Mausoleum Company should dismiss the plaintiff, falsely and maliciously spoke and published of and concerning the plaintiff, the false, scandalous, malicious, and defamatory words following, that is to say, Mr. Harris, (thereby then meaning the plaintiff,) has been dismissed from the Brewers' Company, (thereby then meaning that the plaintiff had been dismissed from his said office of secretary to the said Brewers', Distillers', Licensed Victuallers', and General Life and Fire Assurance, and Loan and Endowment Company,) for gross misconduct. say, he, (thereby then meaning the plaintiff,) has obtained from the solicitors, (thereby then meaning the solicitors of the said Brewers', Distillers', Licensed Victuallers', and General Life and Fire Assurance, and Loan and Endowment Company namely, the said Messrs. H., B. & L., who were the solicitors of the said last-mentioned company as aforesaid,) money under false pretences, and taken up a bill

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of his own, (thereby then meaning his, the plaintiff's own,) with it; with this that the plaintiff will verify, that the defendant thereby then meant to insinuate and have it understood by the said W. J. Voules and R. Churchill, and so the said W. J. Voules and R. Churchill then understood, that the plaintiff had been guilty of obtaining money under false pretences from the said Messrs. H. B. & L., with intent to cheat and defraud them of the same, and so the said W. J. Voules and R. Churchill understood the said words. By means of the committing of which said several grievances by the defendant as aforesaid, the plaintiff had been and was greatly injured in his good name, &c., and also by means of the premises the plaintiff had sustained and incurred, and become liable to pay, divers costs and expenses, amounting, to wit, to the sum of 50*l.*, in and about the proving to the satisfaction of the directors of the said London, Necropolis and National Mausoleum Company, who had called upon the plaintiff, as such auditor as aforesaid, for his answer to the said charge of obtaining money under false pretences, so alleged against him by the defendant as aforesaid, that he, the plaintiff, was not guilty thereof; and also by means of the premises the plaintiff had been and was otherwise greatly injured, &c.

The defendant pleaded not guilty.

The cause was tried before Jervis, C. J., at the sittings at Westminster after the last term. It appeared that the plaintiff had been the secretary of the Brewers' Insurance Company, and also auditor to the London Necropolis Company; that, certain charges having been made against him to the directors of the Brewers' Insurance Company, the plaintiff was, by a resolution of the 9th of February, 1852, requested to attend the board of directors on the 12th, to explain the transactions; and that, on the latter day, the plaintiff not appearing, the following minute was entered in the company's book:

"At a special meeting of the directors of the Brewers', Distillers', Licensed Victuallers', and General Fire and Life Assurance, and Loan Endowment Company, held at their offices, No. 18 New Bridge Street, Blackfriars, on the 13th of February, 1852 — present, &c., &c.

"Copies of the two letters convening the meeting were read.

"Copies of the resolutions of the 9th instant having been forwarded to the secretary, who did not attend the meeting, the directors proceeded to consider the charges alleged against Mr. Harris.

"The first was, that of having applied to Messrs. Burnett and Lang for 3*l.* on the 6th January last, 'for office purposes.' Mr. Clarke, (the chairman,) stated that he had been at the office the whole of that day, that the petty-cash box was at that time under Mr. Harris's control, and that, if money had been required, it might have been had of him, (Mr. Clarke.) Messrs. Burnett and Lang's check was proved to have been used to pay a private bill. The charge, therefore, against Mr. Harris is, that of misapplying the money of the company in this instance.

"The next charge was, that of telling a falsehood on the morning of the ordinary general meeting. Mr. Clarke, (the manager,) having required of Mr. Harris a sight of the balance-sheet and auditors'

report, he replied that the auditors had been occupied with the accounts very late on the preceding evening, that they had taken the balance-sheet and report away with them, and that he expected them to arrive with the papers very shortly. Mr. Lang stated that the examination of the books was concluded on the evening preceding the meeting; that the auditors, after having erased a portion of their report, the same was read to Mr. Harris in the presence of Mr. Adron and his clerk; the auditors then attached their signatures to the report, and placed the papers in the hands of Mr. Harris before they left.

"It was also proved that Mr. Harris, instead of paying Mr. Nelson the salary due to him, did not do so; that, in two instances, he gave his I O U for 1*l.* 1*s.* each; and it now appears that there is a balance due to Mr. Nelson, of 8*l.* 6*s.* 11*d.* Mr. Clarke also mentioned that a similar instance had occurred in reference to Mr. Symonds's bill in August last, when Mr. Harris gave him 5*l.* in money, and an I O U for the difference, namely, 18*s.* 6*d.* The charge in the petty-cash book is for the whole amount.

"The last charge was that of interlining the minute-book at page 198, (for 1851,) where the words 'five years' are introduced, and a note appears at the end of the minutes, to the effect that the words 'for five years,' between the sixth and seventh lines on page 198, having been first inserted as part of the order and resolution, Mr. Gurney observed that he most distinctly remembered the circumstances connected with the resolution, and declared, that, if he had heard the minutes read, it, (the passage,) could not have escaped him. Other members of the board concurred with him, and believed that that part of the minutes had been entirely suppressed."

This resolution was read and confirmed at a meeting of the 14th of February, by another resolution in the following terms:—

"At a meeting of the directors of the Brewers', Distillers', Licensed Victuallers', and General Life and Fire Assurance, and Loan and Endowment Company, held on the 14th of February, 1852—

"It was resolved unanimously, that the secretary of this company, Mr. S. P. Harris, has been guilty of gross misconduct; that the secretary of this company, be, and he is hereby removed and dismissed from the office of secretary."

At a meeting of the London Necropolis and National Mausoleum Company, of which company the defendant was also a director, held on the 23d of February, the defendant communicated to his co-directors the fact of the plaintiff's having been dismissed by the other company. The minute-book of that date stated the transaction thus:

"LONDON NECROPOLIS AND NATIONAL MAUSOLEUM COMPANY.

"At a meeting of the directors, February 23d, 1852, Mr. Thompson proposed that Mr. S. P. Harris, having been dismissed from the office of secretary to the Brewers', Distillers', &c., Insurance Company, for gross misconduct, he is no longer fit to be an auditor of the company; when the chairman explained that it was impossible to pass such a resolution, without calling upon the party implicated."

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his explanation and defence ; the resolution not being seconded, and it being stated that the charges were, obtaining money under false pretences from the solicitors, and giving an I O U for a petty-cash debt,—upon which statement, the board resolved, that, Mr. Thompson having reported to the board that one of the auditors of the company had been dismissed from his office of secretary of an insurance company for gross misconduct, it was moved that an inquiry be instituted into the whole matter.

“ RICHARD CHURCHILL, Secretary.”

A copy of this resolution having been forwarded to Harris, he, on the 8th of March, attended with his attorney before the board, having in the mean time written to Thompson, threatening an action. At this meeting, Thompson being called upon, declined to make any charge against Harris in the presence of his attorney. The following is the minute of what took place upon that occasion :—

“ LONDON NECROPOLIS AND NATIONAL MAUSOLEUM COMPANY.

“ Board Meeting, March 8, 1852

“ This being a special meeting convened for the purpose of entering into an inquiry as to the charges brought by Mr. Thompson against Mr. S. P. Harris, one of the auditors of the company, at a meeting held on the 23d ultimo, and the parties concerned having had due notice of the appointment, and being required to attend, a preliminary discussion arose as to the attendance of solicitors for the parties, of which due notice had been given. The chairman explained that the charges could not be further gone into in the absence of the accused, and he thought that it would be more regular that the solicitors of each party should attend, as the board merely sat to receive, and not to produce, the evidence. Captain Gardiner concurring at length in this view, Mr. Harris and his solicitor, Mr. Wilkinson, were called in, as was also Mr. Lang, who was understood to be in attendance, and who was stated by Mr. Thompson to be the solicitor to the Brewers', Distillers', &c., Insurance Company, and to be in possession of the requisite evidence to support his charges.

“ The chairman then called upon the accuser to support his charges; when he referred to Mr. Lang, who stated that he declined to produce any evidence in the presence of Mr. Harris and his solicitor. The chairman then asked him whether he was prepared to lay the decision of the Brewers' Company, and the evidence upon which they came to this decision, before the board, in the presence of Mr. Harris, without his solicitor; when he declined to do either. Mr. Lang was then pressed to lay his case before the board, in the presence of the accused, without his solicitor, which he again declined to do, as the party charged was present.

“ The chairman then called upon Mr. Thompson to support his charges, when he said he could only refer to Mr. Lang, who was not however his solicitor, but the solicitor to the Brewers' Company, and had the requisite documents in his possession; and that he appeared merely as director, and not as prosecutor. Mr. Lang stated that

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Mr. Harris was not present when the charges were brought against him at the Brewers' Company's board, nor when they came to their decision; and that, as legal proceedings were pending,¹ he declined to put Mr. Harris or his solicitor in possession of his case, or to produce any documents, or give any evidence whatever, — when it was resolved that the board, under the circumstances, feeling that they had no evidence before them, could not proceed further in the case.

“R. CHURCHILL, Secretary.”

On the part of the defendant, it was submitted that the alleged slanderous matter, being uttered upon an occasion which made it the interest as well as the duty of the defendant to utter it, and to persons having an interest in knowing the facts, was a privileged communication, and not actionable without proof of malice.

For the plaintiff, it was insisted that the slander went far beyond what the occasion justified, and amounted to an assertion, not merely that the plaintiff had been dismissed by the Brewers' Company for alleged misconduct, but to a substantive assertion that he had been guilty of gross misconduct; and that the defendant's refusal to substantiate the charges against the plaintiff, when called upon to do so, was evidence of malice, to rebut the privilege, if any existed.

The Lord Chief Justice thought that the communication was under the circumstances privileged, and he doubted whether there was any evidence of malice; but, in order to prevent the necessity of going down again, he left the question of damages to the jury, reserving leave to the defendant to move to enter a verdict for him, if the court should be of opinion that the communication was privileged, or that there was no evidence of malice which ought to have been submitted to the jury.

The jury having found for the plaintiff, damages 150*l.*,

Byles, Sergt., on a former day in this term, accordingly obtained a rule *nisi*. He relied on *Somerville v. Hawkins*, 10 Com. B. 583: s. c. 3 Eng. Rep. 450, and *Taylor v. Hawkins*, 16 Q. B. 308; s. c. 5 Eng. Rep. 253.

Wilkins, Sergt., and *J. Brown*, now showed cause. There is nothing in the case of *Somerville v. Hawkins* inconsistent with the plaintiff's right to retain the verdict in this case. Maule, J., there says: “In this case, supposing the defendant himself to believe the charge, — a supposition always to be made when the question is whether a communication be privileged or not, — it was the duty of the defendant, and also his interest, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff; as such association might reasonably be apprehended to be likely to be followed by injurious consequences, both to the

¹ Alluding to an action which had been commenced by Harris against the Brewers' Company.

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servants and to the defendant himself." Here, it was impossible the defendant could believe the charges to be true. There was ample evidence to go to the jury, that he was actuated by malicious motives. Putting a plea of justification on the record, and abstaining from offering evidence in support of it, has been held a ground upon which a jury may infer malice. *Warwick v. Foulkes*, 12 M. & W. 507; *Simpson v. Robinson*, 12 Q. B. 511. Lord Abinger, in the former of these cases, says: "The putting this plea on the record is, under the circumstances, evidence of malice, and a great aggravation of the defendant's conduct, as showing an *animus* of persevering in the charge to the very last."

[MAULE, J. Undoubtedly there may be circumstances under which the putting on the record a plea of justification, may afford evidence of malice.]

TALFOURD, J. I do not perceive that the defendant here did any thing more than assert that which was an undoubted fact.]

The words show that the defendant intended to impute to the plaintiff that he had been guilty of the misconduct with which he was charged. In *Roberts v. Camden*, 9 East, 93, it was held that the rule of construction as to slanderous words, is to construe them in their plain and popular sense, — such in which an ordinary hearer would have understood them at the time they were spoken; and therefore the defendant's saying of the plaintiff, that "he was under a charge of a prosecution for perjury," was actionable; for that, after verdict, (by which the jury, who are to judge of the intent of the speaker, must be taken to have negatived that he meant to speak of a prosecution for a perjury which the plaintiff had not committed,) the words, not having been justified, must be taken to be false; and, being unqualified by any context, and unexplained by any occasion to warrant them, the law would infer malice from the falsehood of the accusation, which, in the common acceptation of the words, imputed perjury to the plaintiff.

MAULE, J. There, the statement was false. Here, you cannot say that it was false, that, in a certain sense, the Brewers' Company had dismissed the plaintiff for misconduct.]

In *Blogg v. Sturt*, 10 Q. B. 905, it was held that express malice may be proved by evidence that the imputation is in part false, even when the communication is of such a nature as to raise a *prima facie* presumption of absence of malice. Persisting in the charge improperly and unfairly, was evidence of malice. In *Williams v. Gardiner*, 1 M. & W. 245, in libel, one of the counts set forth the following passage of a letter from the defendant to one Pierce, — "I have reason to suppose that many flowers of which I have been robbed are growing upon your premises," innuendo, that the plaintiff had been guilty of larceny, and had stolen from the defendant certain plants, roots and flowers of the defendant, and had unlawfully disposed of them to Pierce, and unlawfully placed them in Pierce's garden. The previous part of the letter stated that the plaintiff, whom Pierce had taken into his employ as a gardener, had been in the defendant's service in the same capacity, and had been discharged for dishonesty. It was held, on error, that the innuendo was not

too large, and that the count was good. Lord Denman, delivering the judgment of the Exchequer Chamber, said: "We are of opinion that this judgment must be affirmed, not, however, on the ground that the word flowers, standing alone, can have a new meaning given to it by the innuendo, else the case would very much resemble that of 'the barn full of corn'; *Barham's Case*, 4 Co. Rep. 20, but on the ground that the innuendo is referable to the whole passage which it follows, and not to the word flowers only. But that whole passage clearly and naturally bears the meaning ascribed to it by the innuendo: its evident meaning is, that flowers capable of being planted, i. e. plants, roots, and flowers, had been stolen by the plaintiff from the defendant, and planted in Pierce's garden. In deciding the case on this ground, we are not only not introducing any innovation, but abiding strictly by the rule laid down in former cases." An innuendo cannot be too large which only attributes to the slanderous words their ordinary and natural meaning.

Byles, Sergt., and *Willes*, in support of the rule. The communication in question was made by a man who had an interest in making it, and to persons having an interest in receiving it; and the party making it stood in a position which rendered it his duty as well as his interest to make the communication. It was, therefore, clearly a privileged communication; and, consequently, to entitle him to maintain this action, the plaintiff was bound to prove malice. The proof in that respect entirely failed. It appeared, that certain charges had been made against the plaintiff, in connection with the Brewers' Company; that an opportunity was given him to rebut those charges; that he declined to appear; that the company in consequence dismissed him from their employ; and that the defendant, who was a director of another company, communicated to them the fact of the plaintiff's having been so dismissed from the Brewers' Company, with a view to procure his dismissal from the service of the other company also. To say the least of it the defendant's conduct was equally consistent with *bona fides* as with malice. *Sommerville v. Hawkins*, 10 Com. B. 583; s. c. 3 Eng. Rep. 450, expressly decides, that, where the communication is *prima facie* privileged, to entitle the plaintiff to have the question of malice left to the jury, it is not enough that the facts proved are consistent with the presence of malice as well as with its absence; for, that malice must be proved, and therefore its absence must be presumed until such proof is given. Speaking of the principle on which the doctrine of privileged communication rests, Maule, J., in that case, says: "It comprehends all cases of communications made *bonâ fide*, in the performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words." And, in dealing with the question of malice, he says: "The facts proved are consistent with the presence of malice, as well as with its absence. But this is not enough to entitle the plaintiff to have the question of malice left to the jury; for, the existence of malice is consistent with the evidence in all cases except those in which something inconsistent

with malice is shown in evidence: so that, to say, that in all cases where the evidence was consistent with malice, it ought to be left to the jury, would be in effect to say that the jury might find malice in any case in which it was not disproved, — which would be inconsistent with the admitted rule, that, in cases of privileged communication, malice must be proved, and therefore its absence must be presumed until such proof is given." And that has been expressly adopted as the rule, by the Court of Queen's Bench, in *Taylor v. Hawkins*, 16 Q. B. 308; s. c. 5 Eng. Rep. 253. There, a master, having dismissed his servant for dishonesty, refused to give him a character, alleging to those who asked the character, that he had discharged him for dishonesty. The servant's brother afterwards inquired of the master why he had treated him so, and kept him out of a situation; to which the master replied: "He has robbed me, and, I believe, for years past;" adding, that he concluded so from the circumstances under which he had discharged him. Only one instance of actual robbery had been imputed: and it was held, that the answer did not go beyond the privilege afforded by the inquiry; and that, on the trial of an action for speaking words, as above stated, in the presence of a third person, and in answer to inquiries by the brother, no further proof being offered by the plaintiff to show malice, the judge ought not to have left the question of malice to the jury. "The rule," said Lord Campbell, "is, that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice: if he gives no such evidence, it is the office of the judge to say that there is no question for the jury, and to direct a nonsuit, or a verdict for the defendant." And Coleridge, J., says "The dismissal was an occasion which justified stating the cause, and rebutted the presumption of malice: and the learned judge ought to have told the jury, that, if nothing more appeared, it was rebutted. The plaintiff then had to show other facts which, as Maule, J., said in *Somerville v. Hawkins*, were more consistent with the existence of malice than with its non-existence. Was the calling in a third person such a fact in the present case? On the contrary, it was one of the very things which a just and prudent man would have been most desirous of doing."

[JERVIS, C. J. It is difficult to say, in the present case, that the jury were not warranted in saying that the defendant meant to impute false pretences: not that I think that material; for, it is equally a privileged communication.]

The onus was on the plaintiff.

[MAULE, J. The defendant used the words in question for the express purpose of procuring the plaintiff to be dismissed from the service of the London Necropolis Company. The defendant, it appears, was a person who had taken a part in the dismissal of the plaintiff from the Brewers' Company's employ, and might be presumed to have full knowledge of the truth or falsehood of the charges on which that company acted. Suppose he had said: — "I was so convinced of the truth of the charges made against Harris, that I concurred in discharging him," — would not that be evidence of his assertion that

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the charges were true? And there are circumstances in addition, from which the jury might, I think, be well justified in thinking that the defendant intended the persons he addressed to understand that the man was guilty of the misconduct imputed to him. But still we think it a privileged communication.]

That being so, it was incumbent on the plaintiff to prove malice; and of that there was not any evidence whatever.

JERVIS, C. J. The discussion we have heard upon this rule satisfies me that I was wrong in leaving the case to the jury; for that there was no evidence to show any express malice on the part of the defendant. I did not at the time give any opinion, but took the course I did for the purpose of preventing the necessity of sending the case down again. The facts were shortly these: — The plaintiff was the secretary of an association called the Brewers' Company. He had, it appears, received a vote of thanks from the managing body, for his services in that capacity, in January, 1851, and again in January, 1852. Shortly afterwards, namely, on the 4th of February, 1852, certain charges were made against the plaintiff; and, on the 9th, those charges were the subject of discussion before the board, the defendant being present as a member of it, when the plaintiff was informed that he was suspended from his office, and desired to withdraw. He afterwards received notice to attend before the board on the 12th; but, as he did not do so, the committee, treating his non-attendance as a sort of judgment by default, formally dismissed him. The defendant, knowing the nature of the charges preferred against the plaintiff, and being likewise a director of another company, called the London Necropolis Company, of which the plaintiff was auditor, on the 23d of February, at a meeting of the directors of that company moved a resolution to the effect that Harris, having been discharged by the Brewers' Company, for gross misconduct, was unfit to continue in their service as auditor: and, in answer to inquiries the defendant stated that the charges against the plaintiff were, the obtaining of money from the solicitors of the company by false pretences, and taking up a bill of his own with it. Whether the defendant thereby meant to assert that the charges were well founded, or merely that they were the charges upon which the Brewers' Company proceeded, I do not stop to inquire: for, even if he did mean to assert that the charges were well founded, still the communication, in my opinion, be privileged. If the defendant had said of the plaintiff, "He has been dismissed by the Brewers' Company for gross misconduct, and I believe him to have been guilty," that would have been privileged. It is not pretended that the plaintiff had admitted the innocence of the charges. If so, was there evidence of that fact, so as to rebut the defendant's imputation? I think not. The only ground relied on is showing express malice, which was not shown until the 8th of March, 1852, when the plaintiff was called before the board of directors of the London Necropolis Company, and the defendant declared to enter upon the trial of the charges, and at that time to go into the details of the charges.

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that he had received a letter from the plaintiff threatening him with an action. He might fairly say that it was enough for him, as a director, to make a general charge, and that it was no part of his duty to furnish evidence. That clearly is no evidence of malice: it must be something that is consistent only with a desire to injure the plaintiff, to justify a judge in leaving the question of malice to a jury—as is laid down by my brother Maule in the case of *Somerville v. Hawkins*. For these reasons, I am of opinion that the rule to enter a verdict for the defendant should be made absolute.

MAULE, J. I am of the same opinion. This was clearly a case of privileged communication. The defendant was a director of the Brewers' Company, who had thought fit to dismiss the plaintiff on the ground of certain imputed misconduct, which the plaintiff, having the opportunity offered to him, declined to justify or explain. The defendant being also a director of the London Necropolis Company, whose auditor the plaintiff was, proposed that the plaintiff should be dismissed also from the service of that company. Being asked what the charges against the plaintiff were, he answered, that the plaintiff had been dismissed by the Brewers' Company for obtaining money from the company's solicitors by false pretences, and taking up a bill of his own with it. That the defendant might properly, in his capacity of director of the London Necropolis Company, make the communication he did to the directors of that company, for the purpose of protecting their interest and his own,—assuming the absence of malice,—there can be not doubt. It was clearly his duty as well as his interest to make the communication. He might reasonably presume that it would be to the advantage of the company to have the fact communicated to them. Even though it did impute to the plaintiff the actual commission of the offence imputed to him, or amount to an assertion on the defendant's part that he believed the charges to be true,—which he might reasonably do, after the plaintiff had declined to avail himself of the opportunity afforded him to repel them,—still the communication would be privileged. Then, assuming it to be a privileged communication, it is conceded that the plaintiff cannot recover unless he shows malice. There must be proof that the defendant was not actuated by a justifiable motive, but by some evil intention towards the plaintiff, and not with the *bonâ fide* intention to protect his own and the company's interests. The question is, whether the defendant has done any thing to deprive him of the protection which the law affords to communications *bonâ fide* made in cases where the duty or the interest of the party calls upon him to make it. I do not think he has. He appears only to have told his co-directors what actually took place between the plaintiff and the Brewers' Company: and there seems to have been good ground for believing that the thing was true, from the circumstance of the plaintiff's having retired from the investigation. That which the plaintiff's counsel have relied on as showing malice, is, that, when called upon to support the charge in the presence of the plaintiff and his solicitor, he declined to do so. One can conceive many grounds

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upon which the defendant might properly do that. He might fairly say to his co-directors,—"I told you Harris was dismissed for misconduct, by the Brewers' Company; and I believe that dismissal to have been just, because it took place after an investigation by the committee of the charges made against him. I am not called upon to prove my grounds of belief beyond that. I have a right and a duty to put you in possession of what I know: but I am not prepared, nor am I bound, to produce strict proof of the truth of the charges upon which the Brewers' Company acted." I think that is a reason for which the defendant might very properly do that which is now imputed to him as a ground of malice. It is enough to say, that what he did may have arisen from circumstances inconsistent with malice. It appears that the principle which this court laid down upon that subject in *Somerville v. Hawkins*, and which I think a very important one, has since been adopted by the Court of Queen's Bench, in *Taylor v. Hawkins*, 16 Q. B. 308; s. c. 5 Eng. Rep. 253. Upon the whole, therefore, I think this was a privileged communication, and that there was no evidence of malice to be left to the jury, to deprive the defendant of the protection which the law gives to communications of that description.

WILLIAMS, J. I am of the same opinion. It is not necessary to say whether there was any evidence to go to the jury, that the words were spoken in the sense imputed by the innuendo, because the communication was privileged, and there was no evidence from which malice could be inferred. Few rules of law are of greater practical importance than that which requires proof of express malice, where the words are spoken under circumstances which make the communication privileged. That rule would be very inconveniently narrowed if the objection in this case were allowed to prevail. We were pressed with an argument founded on the case of *Blogg v. Sturt*, 10 Q. B. 905, that malice may be inferred where the matter stated is false in fact. But the mere circumstance of the statement being false will not suffice to show malice unless there is some evidence to show that the defendant knew it to be false. *Fountain v. Boodle*, 3 Q. B. 5.

TALFOURD, J. I am entirely of the same opinion. There was no evidence here that the charges made against the plaintiff were false, and not a scintilla of evidence to show that the defendant knew them to be false. The whole evidence showed that he acted with the most perfect *bona fides*.

Rule *discrete*.

 Peterson v. Ayre.

 PETERSON v. AYRE.¹

January 18, 1853.

Contract — Construction of.

Semble, that an agent who sells goods for a foreign principal, is responsible for a breach of contract by his principal in not delivering them.

The measure of damages in the case of a breach of a contract to deliver goods at a specified time, is, the difference between the contract price and the market price at the time of the breach of contract, or the price for which the vendee had sold; but the latter cannot recover, as special damage, the loss of anticipated profits to be made by his vendees.

ASSUMPSIT for a breach of a contract for the sale of linseed cake. The declaration stated that, theretofore, to wit, on the 5th of January, 1852, the plaintiff, at the request of the defendant, bargained with the defendant to buy of him, the defendant, and the defendant then sold to the plaintiff, a large quantity of linseed cakes, to wit, from 80 to 120 tons of best oblong fresh-made Flensburg linseed cakes, at 6*l.* 10*s.* per ton, cost and freight, to wit, from Flensburg aforesaid to a safe port on the east coast of Great Britain, or 6*l.* 13*s.* per ton to a safe port in the Channel; orders to be given on signing bills of lading; but that, if the ship should be ordered to the said Channel, and the freight should be less than 3*s.* additional to the freight to the east coast of Great Britain, the plaintiff should have the benefit of such difference; the said cakes to be shipped, to wit, at Flensburg aforesaid, the first open water after the end of the said month of January in the year aforesaid; and payment to be made by London bankers' acceptances, at three months' date of and on handing invoices and bills of lading in London aforesaid, or cash less 1½ per cent. in exchange for invoices and bills of lading in London aforesaid. That thereupon, to wit, on the day and year first aforesaid, in consideration of the premises, and that the plaintiff, at the like request of the defendant, then promised the defendant to accept and receive the said linseed cakes, and pay for the same in manner aforesaid, the defendant then promised the plaintiff to cause the said linseed cakes to be shipped, to wit, at Flensburg aforesaid, the first open water after the end of the said month of January in the year aforesaid. That Flensburg aforesaid, before and at the time of the making of the said bargain and promise, was and is a seaport town situate in parts beyond the seas, to wit, on the shores of the Baltic sea, the water of the said port being usually frozen over during the early part of the winter of each year, and at some time after the end of January becoming open water. That, after the end of the said month of January, 1852, and before the commencement of this suit, to wit, on the 1st of February in the same year, there was open water at Flensburg aforesaid, the same then being the first open water

¹ 13 Common Bench Reports, 353.

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there after the end of the said month of January, 1852; and the said water at Flensburg aforesaid continued and was open from thence continually until the commencement of this suit. That the plaintiff always, from the time of the making of the said bargain, was ready to accept and receive the said quantity of linseed cakes, and pay for the same in manner aforesaid, and was also ready, on the signing bills of lading for the said linseed cakes, to give orders to the defendant, and to the ship on which the same should be loaded, to what safe port on the east coast of Great Britain, or in the said Channel, the said linseed cakes were to be carried, and there delivered for the plaintiff. Breach, that, although before and at the said time of there being the first open water at Flensburg aforesaid after the end of the said month of January, 1852, and long before the commencement of this suit, to wit, on the said 1st of February in that year, he the plaintiff requested the defendant to cause the said quantity of linseed cakes to be shipped according to the said bargain, and to be carried for the plaintiff to Lynn, then being a safe port on the east coast of Great Britain aforesaid; yet the defendant, disregarding his said promise, did not nor would ship or cause to be shipped, to wit, at Flensburg aforesaid, the said quantity of such linseed cakes as aforesaid, or any part thereof, or any linseed cakes whatsoever, the first open water after the end of the said month of January in the year aforesaid, or within a reasonable time thereafter; but, on the contrary thereof, after the end of the said month of January in the year aforesaid, and before the commencement of this suit, to wit, on the 26th of March in the year aforesaid, being a long and unreasonable time after the said first open water at Flensburg aforesaid after the end of the said month of January in the year aforesaid, he, the defendant, as and for a performance of his said bargain and promise, shipped at Flensburg aforesaid a certain quantity, from 80 to 100 tons, to wit, 100 tons, of the said linseed cakes, in a ship or vessel, to wit, the *Catherina*, and the said ship then sailed and proceeded to the said port on the said east coast of Great Britain, to wit, to the said port of Lynn. That, after the making of the said promise, and before the same was broken by the defendant, to wit, on the 6th of January, 1852, the said linseed cakes so to be shipped by the defendant as aforesaid, were by the plaintiff re-sold to one John Drake Crofts, at a profit, to wit, at 8*l.* per ton, to be shipped, to wit, at Flensburg aforesaid, the first open water after the end of the said month of January in the year aforesaid, and to be delivered for the said John Drake Crofts at Lynn aforesaid, but which said linseed cakes, by reason of the said delay in shipping thereof in manner aforesaid, became useless to the said John Drake Crofts, and he the said John Drake Crofts refused to accept or to pay for the same; and thereby, and by means of the premises aforesaid, not only had the plaintiff lost and been deprived of the profits and advantages he would have derived from the said bargain for the said linseed cakes by and between the plaintiff and the defendant as aforesaid, and from the said sale thereof to the said John Drake Crofts, but also he the plaintiff had become liable to pay to the said John Drake Crofts a certain large sum, to wit, 500*l.*, which

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he the said John Drake Crofts had claimed from him for the losses, damages, and costs of the said John Drake Crofts in respect of the non-shipment of the said linseed cakes the first open water at Flensburg aforesaid after the said end of January in the year aforesaid, or within a reasonable time after such open water, &c.

The defendant pleaded, first, non assumpsit; secondly, that the plaintiff did not bargain with the defendant, nor did the defendant sell to the plaintiff, in manner and form as the plaintiff had above alleged; thirdly, that he did ship at Flensburg aforesaid the said quantity of such linseed cakes as aforesaid the first open water after the end of the said month of January in the year aforesaid, to wit, on the said 26th of March in the year aforesaid, according to the said bargain and sale, and his said promise on that behalf; fourthly, that the time of the said shipment in the count mentioned to have been made, was a reasonable, and not, in manner and form as in the count in that behalf alleged, a long or unreasonable time after the said first open water at Flensburg aforesaid after the end of the said month of January in the year aforesaid; fifthly, that after the making of the promises of the plaintiff and the defendant in the count mentioned, and before any breach thereof, to wit, on the 9th of January in the year aforesaid, it was mutually agreed between the plaintiff and the defendant that the said quantity of linseed cakes should be ready for shipment, to wit, at Flensburg aforesaid at the first open water in spring in the year aforesaid, to be taken off at some time before the end of April in the year aforesaid, the ship to be named when the charter was fixed; and that, except so far as altered by such agreement, the bargain and sale and mutual promises of the plaintiff and the defendant in the count mentioned should remain in full force; and the plaintiff and the defendant then, in consideration of the premises, mutually discharged each other from the observance and performance of the same bargain, sale, and promises, so far as inconsistent with the said agreement. Averment, that within a reasonable time after the making of the same agreement, to wit, on the day and year last aforesaid, he did fix a charter of a certain ship called the Catherina, for the shipment of the said quantity of such linseed cakes as aforesaid, and did then name the said ship to the plaintiff; and that the said quantity of linseed cakes was ready for shipment, to wit, at Flensburg aforesaid, at the first open water in spring in the year aforesaid, to wit, on the day and year last aforesaid; and, within a reasonable time afterwards, and before the end of the said month of April in the year aforesaid, to wit, on the said 26th of March in the year aforesaid, the same being a reasonable time after the said first open water in spring in the year aforesaid, the defendant shipped at Flensburg aforesaid the same quantity of such linseed cakes as aforesaid in the said ship called the Catherina, and the said ship then sailed and proceeded to the said port on the said east coast of Great Britain, to wit, the said port of Lynn; verification.

The plaintiff joined issue on the first four pleas, and traversed the agreement alleged in the fifth plea.

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The cause was tried before Jervis, C. J., at the sittings in London after Trinity term last. The facts which appeared in evidence were as follows:— The plaintiff and the defendant are both commission merchants in London, the latter being the agent and correspondent of Messrs. Stoppel & Son, of Altona. Early in January, 1852, the defendant authorized Messrs. Howes & Batten, who are commission agents in London, to sell for his principals, Stoppel & Son, a cargo of linseed cakes. Howes & Batten accordingly agreed to sell the linseed cakes to the plaintiff, upon the terms mentioned in the following sold-note:—

“London, 5th January, 1852.

“Sold Thomas Peterson, Esq., of London, as agents, from 80 to 120 tons of best oblong fresh-made Flensburg linseed cakes, at 6*l.* 10*s.*, cost and freight to a safe port on the east coast of Great Britain, or 6*l.* 13*s.* to a safe port in the Channel. Orders to be given on signing bills of lading. It is understood, that, if the vessel is ordered to the Channel, and the freight is less than 3*s.* per ton additional to east coast, that the buyer is to have the benefit of such difference. The cakes are to be shipped first open water after the end of January, and payment by London bankers' acceptance at three months' date from date of and on handing invoice and bill of lading, or cash less 1½ per cent. in exchange for invoice and bills of lading in London.

“As agents, HOWES & BATTEN.”

The plaintiff at the same time signed and delivered to Howes & Batten a bought-note, in the same terms, commencing, “Bought of Howes & Batten, of London, as agents, and for account of their principal, from 80 to 120 tons,” &c.

Instead, however, of handing over this bought-note to the defendant, with a view probably to conceal from each party the name of the other, they exchanged with the defendant the following bought and sold notes:—

“London, January 5, 1852.

“Bought of E. O. Ayre, Esq., of London, for account of Messrs. Jurgen Stoppel & Son, of Altona, from 80 to 120 tons of best oblong fresh-made Flensburg linseed cakes, at 6*l.* 10*s.*, cost and freight to a safe port on the east coast of Great Britain, or 6*l.* 13*s.*, cost and freight to a safe port in the Channel. Orders to be given on or before signing bills of lading. It is understood, that, if the vessel is ordered to the Channel, and the freight is less than 3*s.* per ton additional to east coast, that the buyers are to have the benefit of such difference. The cakes are to be shipped first open water in the spring,¹ after end of January; and payment by London bankers' acceptance at three months' date from date of and on handing invoice and bill of lading, or cash less 1½ per cent. in exchange for invoice and bill of lading, in London.

As agents, and for account of our principals,
“HOWES & BATTEN.”

¹ These words were inserted after the bought and sold notes had been exchanged.

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“ London, January 5th, 1852.

“ Sold Howes & Batten, for account of their principals, from 80 to 120 tons of best oblong fresh-made Flensburg linseed cakes, at 6*l*. 10*s*., cost and freight to a safe port on the east coast of Great Britain, or 6*l*. 13*s*., cost and freight to a safe port in the Channel. Orders to be given on or before signing bills of lading. It is understood, that, if the vessel is ordered to the Channel, and the freight is less than 3*s*. per ton additional to east coast, that the buyers are to have the benefit of such difference. The cakes are to be shipped first open water in the spring, after the end of January; and payment by London bankers' acceptance at three months' date from date of and on handing invoice and bill of lading in London, or cash less 1½ per cent in exchange for invoice and bill of lading, in London.

“ As agent to and for account of Messrs. Jurgen Stoppel & Son, of Altona.
EDWARD O. AYRE.”

On the 7th of January, Howes & Batten, in a letter addressed to the defendant, wrote as follows:—“ The contract for the 80 to 120 tons of Flensburg cakes for a shipment first open water after end of January, is in order; we having got the alterations made.¹ There is one essential thing still omitted, which you did not insert, namely, our commission of 1 per cent. Requesting you to confirm this in your next.” To this the defendant replied on the following day:—“ Of course I consider you entitled to 1 per cent. upon the Flensburg linseed cakes.”

On the 3d of February, Stoppel & Son wrote a letter to Howes & Batten, from which the following are extracts:—

“ Mr. Ayre advised us of the contract closed with you for 80 to 120 tons of Flensburg linseed cakes at 130*s*., for cost and freight to east coast, including London, or 6*l*. 13*s*. cost and freight to Channel, and for which we have since, in accordance with a letter received from Mr. Ayre, of the 27th ultimo, chartered the Catherina, Captain Nibbe, to go round from the Elbe in ballast. She loads about 110 tons. Since closing the charter, Mr. Ayre advises us you wish for a certain quantity matted off; and now beg to ask, for distinctness' sake, if you still wish to have 90 tons divided; there will be time to have your letter before the vessel arrives in Flensburg; and at the same time hand us the port of destination, and name the mode of payment. The Catherina is chartered to a safe port on the east coast, London included, and for the Channel; and, as soon as arrived at Flensburg, we shall take care to get a prime cargo shipped by her.”

On the following day, and before the foregoing letter could have reached its destination, Howes & Batten wrote and sent to Stoppel & Son a letter from which the following is an extract:—

“ You will please let us hear from you by return of post, with the

¹ Alluding to the insertion of the words “ in the spring,” which Batten stated took place on the 6th of January, the day after the contract was made.

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name of vessel chartered for this cargo, as our friend is getting impatient of what appears delay in the shipment, and, having re-sold the cargo, is anxious it should at once come forward. As soon as we receive the name of vessel, we will immediately instruct Mr. Ayre as to her destination, and at same time inform him whether the payment is to be cash or bankers' acceptance."

On the 17th of February, the plaintiff wrote to Howes & Batten, as follows:—

"As my contract contains a special clause, that the cargo Flensburg linseed cakes is to be shipped in the first open water after the 31st of January, I cannot take any notice of your communication of this morning, further than renewing my notice to you, that, as the cargo is not even now in course of shipment, I hold you responsible for all damages."

On the same day, Howes & Batten wrote to Stoppel & Son, as follows:—

"Confirming ours of the 13th instant, we have to-day received yours of the 14th instant. Far be it from our wish to have any misunderstanding or disagreement with you; nor is it our intention to make any claim on you for the cargo of Flensburg cakes, unless our buyer makes one on us, and we consider the same to be just and equitable; in which case we feel sure you would not make any objection to the settlement of the same. As you do not seem quite to enter into the spirit of the contract, we send you herewith copy of the same. Our buyer purchased the cakes for the special purpose of getting an early shipment; and, from the mildness of the winter, he was led to believe that there would be no difficulty in having a vessel ready by the 1st of February; and, from date of contract, you must admit there was time to charter a vessel in the Elbe, to get round to Flensburg by the 1st instant, or within a few days of that date. You say the contract says simply cost and freight for shipment from Flensburg, and not that the vessel should be at Flensburg at a certain date; but you omit that the contract says the cakes are to be shipped first open water after the end of January. Now, the waters have not been closed; and therefore we think any mercantile firm will admit that you were bound by contract to make the shipment first week in February, and not later, unless you can prove that a vessel could not get to Flensburg on account of the ice, and that there was no suitable vessel there. The fact is, you delayed too long in chartering a vessel; and, as to saying you did so as soon as you received our orders so to do, we beg to remind you, that the cakes being sold cost and freight, the buyers could have nothing to do with chartering a vessel. We have sent copy of your letter to our buyer, and received the following reply, which please note as from ourselves." [Here followed a copy of the foregoing letter.]

On the 11th of March, Howes & Batten wrote to the defendant,

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informing him that the party to whom the plaintiff had sold the cargo contracted for, had made a claim upon him for loss sustained by him in consequence of his inability to deliver it to the person to whom he had sold it, and that the plaintiff himself claimed 27*l.* 10*s.*, being at the rate of 5*s.* per ton on 110 tons, the advanced price at which he had sold.

On the same day, the defendant wrote to Howes & Batten, declining to accept the plaintiff as a principal; and the plaintiff addressed the defendant as follows:—

“Messrs. Howes & Batten having given me up your name as their principal in the sale of a cargo of Flensburg linseed cakes, as per contract dated the 5th of January, 1852, which, according to such contract, should have been shipped with first open water after the 31st of January, 1852; this not being the case, I herewith give you notice that I accept this cargo under solemn protest, to hold you responsible for all damages sustained by this breach of contract.”

On the 23d of March, Stoppel & Son sent Howes & Batten advice of the shipment of 110 tons of linseed cakes, inclosing invoice; and Howes & Batten on the 26th forwarded the same to the plaintiff. A long correspondence then ensued; and the result was, that the plaintiff declined to receive the linseed cakes, and brought this action to recover, as well 27*l.* 10*s.*, the difference between the price at which he bought and that at which he sold, as also 137*l.* 10*s.* claimed from him as damages by his vendee.

Evidence was offered to show that “in the spring” was a term well known in the trade; but the Lord Chief Justice rejected it.

It was proved that the plaintiff had sold the linseed cakes to one Crofts at an advance of 5*s.* per ton; and Crofts, who was called as a witness, stated that he could have sold them at an advance which would have realized a profit of 137*l.* 10*s.* He however had not sold.

It was further proved that the water was “open” at Flensburg in February, there having been no frost from the 10th till the 15th.

Three objections were taken on the part of the defendant,—first, that there was no contract in fact proved, the bought and sold notes differing in terms,—secondly, that, as Ayre disclosed his principals at the time of the contract, he was not personally liable,—thirdly, that, assuming that there was a contract, it was to ship, at “the first open water in the spring, after the end of January,” and the declaration being “to be shipped the first open water after the end of January,” there was a fatal variance.

A verdict was found for the plaintiff for 27*l.* 10*s.*, the actual loss by the breach of contract, and 137*l.* 10*s.* the contingent loss,—leave being reserved to the defendant to move to enter a verdict for the defendant, or a nonsuit, upon the points reserved, or to reduce the damages to 27*l.* 10*s.*, if the court should be of opinion that the special damage was not recoverable.

Byles, Sergt., in Michaelmas term last, accordingly obtained a rule

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nisi pursuant to the leave reserved, and also for a new trial on the ground of the improper rejection of evidence, and that the verdict was against evidence. He referred to *Patteson v. Gandasequi*, 15 East, 62; *Addison v. Gandasequi*, 4 Taunt. 374, and *Thompson v. Davenport*, 9 B. & C. 71, 4 M. & R. 110.¹

Watson and *Hawkins*, showed cause. *Howes & Batten* were commission-agents in London. The defendant, who was in the habit of receiving consignments from *Stoppel & Son*, of Altona, directed *Howes & Batten*, as agents, to make the contract in question, Ayre paying, or agreeing to pay, them a commission of 1 per cent. *Howes & Batten* accordingly entered into the contract with *Peterson* which is evidenced by the notes signed respectively by *Howes & Batten* and by *Peterson*. *Howes & Batten* thus clearly contract with *Peterson* as agents,—not as agents to buy on behalf of *Peterson*, but to sell on behalf of Ayre. The contract defines what is meant by the spring,—it means, the first open water after the end of January. As to the agent making the contract being relieved from responsibility where he discloses his principal, the authorities are numerous; and, whether the principal is a foreigner or not, makes no difference. If the bought and sold notes which passed between *Howes & Batten* and the plaintiff formed the contract, then this question cannot arise. Further, this is not the case of an agent dealing for a foreign principal; and, if it were, the cases of *Mayee v. Atkinson*, 2 M. & W. 440; *Higgins v. Senior*, 8 M. & W. 834, and *Jones v. Littledale*, 6 Ad. & E. 486; 1 N. & P. 677, show that that circumstance makes no difference.

As to damages, the plaintiff was clearly entitled to recover the difference between the price at which he contracted to buy, and the market price at the time of the breach of contract; and also the amount which Cross, the person to whom he had sold the linseed cakes, would be entitled to claim against him for his breach of the sub-contract.

[MAULE, J. Certainly not. As soon as the plaintiff had notice of the defendant's breach of contract, it was his duty to supply himself with the article, in order to be able to deliver it to his buyer.]

Putting Crofts out of consideration altogether, the plaintiff would have recovered all that the jury have given him here. The damage by what the plaintiff will be called upon to pay to Cross, is a damage directly and immediately flowing from the breach of contract by the defendant.

Byles, Sergt., and *Henderson*, in support of the rule. The first

¹ Mr. Justice Maule took this occasion to correct an error in the report of the case of *Smyth v. Anderson*, 8 Com. B. 21, where, speaking of *Thompson v. Davenport*, his lordship is represented to have said, p. 35, "That case in effect decides, that, if the principal is not named, it is the same as if none exists;" whereas, in truth, what his lordship did say, was, "That case in effect decides, that, if the principal is not named, it is the same as if it were not mentioned that one exists."

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question is, which of the notes constitute the contract by which the plaintiff contends that the defendant is bound, and by which the defendant insists that Stoppel & Son, his principals, are bound? Is it the contract signed between Peterson and Howes & Batten on the one hand? or is it the contract signed between Howes & Batten and Ayre? It is submitted that it must be the latter. Howes & Batten were dealing as agents for the buyers, and not for the seller. This is clearly shown by their letter of the 17th of February, in which they inclose a copy of the contract, and in which they write,—“Our buyer purchased the cakes for the special purpose of getting an early shipment; and, from the mildness of the winter, he was led to believe that there would be no difficulty in having a vessel ready 1st February.” The copy inclosed was not a copy of the contract between Howes & Batten and Peterson, but of that between themselves and Ayre.

[JERVIS, C. J. If Howes & Batten sold to Peterson with the authority of Ayre, then the contract would be between Peterson and Ayre. But that question ought to have been left to the jury.]

Assuming that Howes & Batten were agents for Peterson and also for Ayre,—who is the party bound by the contract, Ayre or his principals?

[CRESSWELL, J. If you assume that Howes & Batten were agents for Ayre, you assume a very material point in the case.

MAULE, J. If the fact is left in doubt, the plaintiff fails, the affirmative being upon him.]

It may still be necessary to discuss the question as to there being a foreign principal, and also the question of variance.

[MAULE, J. The first question will be, whether an English agent contracting to sell for a foreign principal, is personally liable on the contract.]

If the agent is acting for an English principal, and so states at the time, he clearly is not liable, but his principal only. *Spittle v. Lander*, 5 J. B. Moore, 270; 2 Brod. & B. 452. No doubt, the agent may so contract as to be personally liable; but, where a principal is named, the latter only is liable. The leading case upon the subject is *Downman v. Williams*, 7 Q. B. 103. There, a declaration in *assumpsit* alleged a promise by the defendant to pay the plaintiff a certain debt, and to arrange with him the time and mode of paying it.

Issue being joined on *non assumpsit*, a special verdict was found, which set forth a letter from the defendant to the plaintiff, containing the following passage, relied upon by the plaintiff as the substantive contract,—“Your bill of charges in this matter, amounting to 527l. 5s.,” (the sum claimed in this action,) “I also undertake (on behalf of Messrs. Esdaile & Co.) to pay, and will arrange with you the time and mode.” An earlier part of the letter contained an unqualified promise by the defendant to pay the plaintiff another sum; and, in letters written shortly before, and set out in the verdict, the plaintiff and defendant named Esdaile & Co. as the parties to the negotiations, and mentioned the debt now claimed as “to be settled and paid by Esdaile & Co.,” but spoke of negotiations as to other debts

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with reference merely to the plaintiff and defendant. It was held by the Exchequer Chamber,—reversing the decision of the Court of Queen's Bench, (see *Jones v. Downman*, 4 Q. B. 235,)—that the first mentioned letter, upon the face of it, and especially when connected with the other passages above mentioned, imported, as to the sum claimed, only an undertaking by the defendant as agent for Esdaile & Co.; and that, in default of the special verdict directly stating, or finding facts from which it resulted by necessary implication, that there was a want of authority in the defendant to give such undertaking, or any excess of his authority in giving it, the defendant was entitled to judgment. In *Jenkins v. Hutchinson*, 13 Q. B. 744, to assumpsit on a contract alleged to have been made by the defendant to charter a ship to the plaintiff, the defendant pleaded *non assumpsit*,—and the evidence was, that the defendant made a memorandum of charter in B.'s name, and purporting to be signed by the defendant as agent for B.; that the defendant had no authority to contract for B., and knew that he had none; and that B. refused to adopt the contract; and it was held that the defendant was not liable as principal, in an action upon the contract itself; and accordingly a nonsuit was entered. *Lewis v. Nicholson*, 21 Law J. Rep. (N. S.) Q. B. 311; s. c. 12 Eng. Rep. 430, is an authority to the same effect. Lord Campbell there says: "It is difficult to say that one contract can be an authority for construing another. But the nearest case to this, is *Downman v. Williams*, and the construction there was, that words such as these are rather to be taken as a declaration of agency, than an undertaking of personal responsibility. In *Burrell v. Jones*, 3 B. & Ald. 47, there were no such words; and, as to *Hall v. Ashurst*, 1 Cr. & M. 714, there no undertaking could be given on behalf of the parish, and the only reasonable construction was, that it amounted to a personal undertaking." Here, if we look at the contract which the defendant did sign, we find he expressly signs it "as agent to and for account of Messrs. Jurgen Stoppel & Son, of Altona." And it is to be observed that this is a contract which the principals can perform, and which the agent cannot.

[MAULE, J. Is that so? This is not a contract for the sale of a specific chattel; but it might be performed by any one who could procure Flensburg cakes.]

Here, the agent is dealing for foreign principals. Where a man buys in this country for a foreign principal, the rule is, that credit is to be taken to be given to the agent, and not to the principal: per Lord Tenterden, in *Thompson v. Davenport*, 9 B. & C. 87. There is a manifest distinction between a sale and a purchase by an agent. In the one case, the agent is trusted with the value. Here, too, the very terms of the contract contemplate that the performance is to be by the foreign principals. If the contract is taken to be compounded of the two instruments, then the contract signed by the plaintiff is not the contract to which the defendant was a party. The construction contended for on the part of the plaintiff, renders the words "in the spring," idle and insensible.

C A S E S

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE EXCHEQUER CHAMBER,

DURING THE YEARS 1853 - 54.

MORGAN and another, *assignees of PERRIN, plaintiffs, v. MARQUIS and another, defendants.*¹

November 4, 1853.

Detinue — Sale by direction of one Joint Owner.

After the bankruptcy of one of two joint owners of goods, the solvent joint owner may authorize the sale of the goods, and the broker who sells pursuant to such authority, may set it up as a defence in an action by the assignees of the joint owner who has become bankrupt, under the plea of *non detinet*.

The circumstance that the broker was in the first instance employed by the bankrupt, and had no knowledge of any other person being interested in the goods, is immaterial, nor is the broker estopped from setting up the joint ownership by having sent to the assignees an account in which the goods were stated to have been sold for the bankrupt alone.

THIS was an action of debt, with a count in detinue for 1,020 barrels of flour, the goods of the plaintiffs, as assignees.

The material pleas were — never indebted, a denial of the detainer, and a denial of the goods being the goods of the plaintiffs, as assignees.

At the trial, before Erle, J., at the last Liverpool Assizes, it appeared that the action was brought by the plaintiffs as assignees of Perrin, a bankrupt, in respect of 1,020 barrels of flour sold by the defendants after the bankruptcy. The defendants, who were com-

¹ 23 Law J. Rep. (N. S.) Exch. 21; 2 Common Law Rep. 276.

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mission agents, had, in March, 1852, been employed by Perrin, in his own name, to buy flour. No intimation was given to the defendants, nor did they know of any other person being interested in the purchase, and they accordingly bought for Perrin, and made out their advice note for him alone. Some time afterwards the defendants were informed by Perrin that a person of the name of Shute was interested in the transaction to the extent of a moiety. In the early part of August a portion of the flour was sold by the defendants with the knowledge and assent of Perrin and Shute. On the 12th of August Perrin committed an act of bankruptcy, which was known to the defendants on the 17th, and on the 18th they sold the residue of the flour in accordance with directions from Shute, Perrin having, before the bankruptcy, stated that he should be agreeable to any thing that was done by Shute. Perrin was duly made bankrupt, and, in answer to an application of the official assignee for an account of the sale of the whole of the flour, the defendants furnished them, made out as against Perrin only, wrote a letter describing them as "Account sales of flour sold for account of Perrin, and of account current with that gentleman." His Lordship directed the jury, that if Perrin was the party to whom alone the defendants were accountable for the proceeds of the flour, the plaintiffs were entitled to the verdict, but that if they were accountable to Perrin and Shute, the defendants were entitled to the verdict. The jury found for the defendants.

H. Hill now moved for a new trial for misdirection, and also on the ground that the verdict was against the evidence.¹ The misdirection complained of is, that the fact of the sale having taken place after the bankruptcy of Perrin, was not adverted to, whereas the effect of the bankruptcy was to put an end to any authority that Shute had been intrusted with by Perrin, and consequently the sale was wrongful, and on the count in detinue the plaintiffs ought to have had the verdict, at least to the extent of Perrin's interest. *Burt v. Moulton*, 1 Cr. & M. 525.

[PARKE, B. Not so, if they were partners in the transaction.

POLLOCK, C. B. The assignees would take only what Perrin would be entitled to when the accounts with Shute were adjusted and settled.

PARKE, B. A tenant in common cannot sue his co-tenant unless there is a destruction of the chattel.]

Mason v. Farnell, 12 Mee. & W. 674, shows that a defence arising out of a tenancy in common cannot be set up either under *non detinet* or not possessed, but must be specially pleaded.

[PARKE, B. That case only decides that, under these pleas, title cannot be given in evidence, but under *non detinet* it is a good answer that the goods have been sold under a lawful authority.]

¹ The learned judge who tried the cause, reported that he was not dissatisfied with the verdict, and the rule was not pressed for on this ground.

Skip v. Eastern Counties Railway Co.

The bankruptcy was a revocation of the authority given by Perrin. After the dissolution of a partnership a member of the former firm cannot put the partnership name upon negotiable securities, although it existed prior to the dissolution, and he may have had an authority given him to settle the partnership debts. *Abel v. Sutton*, 3 Esp. 168. So after the bankruptcy of one of two copartners, the solvent partner has no power to indorse bills of exchange. He becomes tenant in common with the assignees. *Ramsbottom v. Lewis*, 1 Campb. 272.

[PARKE, B. The continuing partner has as much right as the bankrupt to the proceeds, and their respective shares cannot be ascertained at law. Then here it is a lawful conversion by one partner to sell.]

POLLOCK, C. B. I think there should be no rule. It was an action by the assignees of a bankrupt, and it turned out that one Shute was jointly interested with the bankrupt in the goods, and that the defendant acted under his authority, which was a sufficient justification for them in dealing with the goods.

PARKE, B. I am of the same opinion. Perrin and Shute were tenants in common, and upon Perrin's bankruptcy the assignees became tenants in common with Shute of an undivided share. They cannot maintain this action, because the goods were lawfully sold by the authority of Shute. The cases of *Fox v. Hanbury*, Cowp. 445; *Smith v. Oriell*, 1 East, 368, and *Harvey v. Crickett*, 5 M. & S. 336, establish that a solvent partner is justified in disposing of the goods of the firm to pay the debts of the firm. Whatever remedy there might be, it must be by resort to a court of equity. It is clear that, at law, the assignees have no right to recover a moiety or any other portion. In *Woodbridge v. Swann*, 4 B. & Ad. 633, the cases which seem to be to the contrary are explained on the ground that they were decisions by the Lord Chancellor sitting in bankruptcy, and therefore exercising both a legal and equitable jurisdiction.

ALDERSON, B., and PLATT, B., concurred.

Rule refused.

SKIP v. THE EASTERN COUNTIES RAILWAY COMPANY.¹

November 24, 1853.

Railway Company, Liability of — Accident — Master and Servant.

The plaintiff was a guard in the service of the defendants, a railway company, and his duty was to attach certain carriages to the engine of a goods train, and to despatch the same.

¹ 23 Law J. Rep. (N. S.) Exch. 23; 2 Common Law Rep. 185.

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within a certain time, so as to avoid collision with a passenger train. In consequence of the plaintiff's not having had another person to assist him, the engine started, threw him upon the rails, and a truck passed over his arm. The plaintiff for three months previously had done the same work without any assistance, and without making any objection :—

Held, in an action by the plaintiff against the defendants for compensation for the injury, that the plaintiff having voluntarily undertaken the duty, was not entitled to recover.

THE declaration stated that the plaintiff entered into the service of the defendants, who were the proprietors of a railway, and common-carriers ; that the plaintiff became their servant in the capacity of guard upon the terms that the defendants should take all due and reasonable means and precautions in order to prevent unreasonable and unnecessary danger being caused to the plaintiff in the performance of his duty as such guard as aforesaid ; that although the plaintiff continued in the service and employ of the defendants in the capacity and upon the terms and conditions aforesaid for a long time, yet the defendants did not take such due or reasonable means or precautions as aforesaid, but altogether omitted so to do, and a certain train which the plaintiff in the performance of his duties as such guard had to assist in preparing to be started on the said railway, whilst the plaintiff was so assisting, for the want of the defendants taking such due or reasonable means or precautions, and on no other account, threw the plaintiff, whilst he was performing his duty as such guard, upon the railway and under the train, the wheels whereof crushed his arm.

Plea — Not guilty.

At the trial, before Martin, B., at the Guildhall Sittings in Michaelmas term last, the facts, as stated by the plaintiff, were these : The plaintiff, in July, 1852, was railway guard in the service of the defendants, and on the 5th of that month was on duty at the Lea Bridge station on the Eastern Counties Railway. His duty on that day was to attach forty goods carriages to the engine and to despatch them to Norwich. On previous occasions when he had had the same duty to perform, he had occasionally been assisted by a porter of the company. On the present occasion it was necessary to shift the carriages from one line to another, and within a limited time, in order to prevent a collision with a down passenger train which would shortly become due. Whilst he was in the performance of this work, and for want, as he stated, of an additional person to assist him, the engine started, threw him upon the rails and under the first truck, the wheel of which passed over his arm, which was so crushed that amputation became necessary. The plaintiff had been for three months guard to the same train and had had no under-guard to assist him. Under these circumstances, it was contended on behalf of the defendants, that no breach of duty on their part had been shown, that the plaintiff had voluntarily undertaken to attach the trucks to the engine without any extra assistance, and that he ought to be nonsuited. The learned judge was of this opinion, and the plaintiff was nonsuited accordingly.

Edwin James now moved for a new trial. The question is whether

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railway companies are bound to provide for the safety of their servants. In this case the accident happened by reason of the defendants not having employed another person to assist the plaintiff in attaching the carriages to the engine. The learned judge, at the trial, stated that the plaintiff might have abandoned the line; but he was not at liberty to do so at a moment's notice, and at a time when a passenger train was expected.

[PARKE, B. If his duties were more than he could perform he ought not to have accepted the service.

ALDERSON, B. He might have left the service.]

The plaintiff had not time to perform the duty assigned to him. The company were blamable in not employing a sufficient number of hands. There ought not to have been a nonsuit in this case, for the defendants have not traversed the averment in the declaration that it was their duty to take all reasonable precautions to prevent unnecessary danger to the plaintiff, nor the averment that the accident happened for the want of their taking such precautions. They have admitted the contract as stated on the record.

[PARKE, B. The plea of not guilty traverses the breach; the defendants say they did take due and proper care.]

This case is not similar to *Priestley v. Fowler*, 3 Mce. & W. 1; and it differs from *Wigmore v. Jay*, 5 Exch. Rep. 354; and *Hutchinson v. The York, Newcastle, &c., Railway Company*, 5 Exch. Rep. 343.

[PARKE, B. The defendants were not bound to keep twenty servants. They are to be the judges of the number. They are indeed bound to see that their servants are persons of proper care and skill.

ALDERSON, B. The jury are not to be the judges of the sufficiency of the number of servants a man keeps. The plaintiff stayed in this situation three months without having an under-guard to assist him, and without making any objection.

PARKE, B. He goes into the service and willingly incurs the danger.]

*Per Curiam.*¹ There is no ground for a rule in this case.

*Rule refused.*²

¹ POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

² That a master or employer is not liable to his servant or employee, for an injury caused by the negligence of another servant in the same employment, is well settled on both sides of the Atlantic. See *Farwell v. The Boston and Worcester Railroad Corporation*, 4 Metcalf, 49, (1842); *Murray v. The South Carolina Railroad Company*, 1 McMullan, 385; *Brown v. Max-*

well, 6 Hill, 592, (1844); *Coon v. The Utica and Syracuse Railroad Company*, 6 Barbour, 231, (1849); *Hayes v. Western Railroad Corporation*, 3 Cushing, 270. But in the Southern States this doctrine was said not to apply to a case where the servants were both slaves. *Scudder v. Woodbridge*, 1 Kelly, 195, (1846).

In re ———. Percival v. Stamp.

In re ———.¹

November 25, 1853.

Attorney, Striking off the Rolls — Service.

A rule *nisi* to strike an attorney off the roll, after he has been struck off the rolls of the other courts, must be served personally.

Atherton moved to make a rule absolute which called upon an attorney to show cause why he should not be struck off the roll of this court, he having been struck off the rolls of the Queen's Bench and Common Pleas for misconduct. No cause was shown, but it appeared that the rule had been served at the attorney's place of residence and business upon his son, who had previously acted as his clerk, who said he would give it to his father when he came in.

*Per Curiam.*² That is not sufficient. A rule of this kind must be served personally, as in the case of attachment.

Rule enlarged.

PERCIVAL v. STAMP.³

November 7 and 8, 1853.

Execution — Fi. fa. — Illegal Entry — Abandonment of Execution — Sheriff's Officer, Liability of — Pleading — Continuando.

The assistants of a sheriff's officer, for the purpose of executing a writ of *fi. fa.*, illegally entered the plaintiff's premises on a Sunday, by breaking open a widow. They afterwards, by the officer's direction, abandoned possession on the Monday following. On the Thursday after, the officer himself entered the same premises to execute a distress warrant : —

Held, that he was not debarred by the act of his assistants from selling the goods when seized on the second occasion.

Quære, whether the officer would have been liable, if the illegal entry of his assistants on the Sunday had facilitated his own entry on the Thursday, and he had availed himself of such illegal entry.

The declaration stated that the defendant, on the 6th of March, 1853, broke and entered the dwelling-house and premises of the plaintiff, and continued and remained therein a long space of time, to wit, eight days : —

Held, that evidence was admissible of an entry on the day first named, and also on a subsequent day, although the defendant had, after the first entry, left the premises without intending to return.

¹ 23 Law J. Rep. (N. S.) Exch. 24.

² PARKE, B., ALDERSON, B., PLATT, B., and MARTIN, B.

³ 23 Law J. Rep. (N. S.) Exch. 25 ; 9 Exch. Rep. 167 ; 2 Com. Law Rep. 282.

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TRESPASS. The declaration stated that the defendant, on Sunday the 6th of March, 1853, broke and entered the dwelling-house and premises of the plaintiff, and continued and remained therein for a long space of time, to wit, eight days, and also unlawfully seized and took, and afterwards carried away, divers goods and chattels of the plaintiff, to wit, &c. There was also a count for the wrongful conversion of the plaintiff's goods.

Pleas — First, not guilty; secondly, a justification by the defendant as the bailiff of the sheriff of Kingston-upon-Hull under two writs of *fi. fa.* and two warrants, executed on the Thursday next after the Sunday mentioned in the declaration; thirdly, a justification under a distress for rent due to one Johnson; fourthly, as to continuing in the house after the evening of the Tuesday next following the entry, not guilty; fifthly, as to the residue, payment of 3*l.* into court.

Replication as to the first four issues, joining issue; and as to the last plea a traverse of the sufficiency of the sum of 3*l.* to satisfy the plaintiff's claim.

At the trial, before Wightman, J., at the last Yorkshire Summer Assizes, the facts proved were these: the defendant, who was an auctioneer and sheriff's officer, having, on the 2d of March, received a warrant directed to himself and one Oates to levy on the plaintiff's goods for the sum of 38*l.*, handed it to one of his assistants named M'Kee, with directions to him to execute it. M'Kee with two others (Oates not being one) thereupon entered the plaintiff's house on Sunday the 6th of March by unfastening an upper window, and continued there till the Tuesday evening, when they withdrew by the defendant's orders. On the Thursday following, the defendant's assistant, named Smith, entered the plaintiff's premises by the direction of the defendant to execute a distress warrant received by the latter on that day, and directed to him and Oates. The defendant did not appear on the premises until the Saturday following, when he sold the goods under two writs of *fi. fa.*, one of which was delivered to him on that day, and also under the distress warrant.

Under these circumstances it was contended for the plaintiff that the defendant was answerable for the illegal entry on the Sunday, and that, at all events, he could not justify the entry of his assistants on the Thursday, as they were not named in the warrant. The jury found a verdict for the plaintiff on the fourth issue, damages 3*l.*, in respect of the remaining in possession from the Thursday till the Saturday; and they also found a verdict for the plaintiff on the first plea of not guilty, and for the defendant on the remaining pleas. Leave was reserved to the plaintiff to move to enter a verdict for him for 38*l.* if the court should think that the executions had been improperly executed.

Hugh Hill, for the plaintiff, now moved accordingly. The defendant is liable for the acts of his assistants; and although he did not appear on the plaintiff's premises until the Saturday, he is still responsible for their acts committed from the Sunday till the Tuesday.

Again, he was not authorized to direct his assistants to enter on the Thursday.

[PARKE, B. The illegal act of breaking was abandoned by the assistants on the Tuesday.]

The defendant, by his servants, obtains possession of the house on the Sunday by an illegal act.

[PARKE, B. If an officer arrests a party under an invalid warrant, he cannot, by afterwards obtaining a valid warrant, detain him in custody; but the question is, whether the same principle applies to a seizure of goods as to an arrest of the person. The goods cannot be said to be imprisoned.]

POLLOCK, C. B. The taking a man in a privileged place is actionable, but the taking itself is good.]

Kerbey v. Denby, 1 Mee. & W. 336, applies.

[PARKE, B. The execution was abandoned on the Tuesday, for the officers quitted the house on that day. Can the entry by the defendant's assistants on the Thursday be considered a void act by reason of what had taken place previously? In the case of a party being illegally arrested, the question of personal liberty arises. But I think you will find a different doctrine laid down in *Semayne's case*, 5 Rep. 91; s. c. 1 Smith's L. C. 39; with regard to goods.]

POLLOCK, C. B. In this case there will be no rule. No doubt there are decisions that a sheriff who has taken a man illegally is not entitled by afterwards obtaining a regular writ to detain him by virtue of that writ; and if a sheriff does take a man illegally, he is bound, before he assumes to keep him under a valid writ, to give him an opportunity of going at large. This proceeds on the principle of favoring personal liberty. But the analogy does not hold with respect to goods, as they cannot, with any propriety of language, be said to be in a state of confinement.

PARKE, B. I am of the same opinion. I think the learned judge was right in the view he took of this case. The same rule does not apply to the case of a sheriff seizing goods after an illegal entry as holds with respect to a sheriff who, in the first instance, arrests a party illegally and then detains him under a legal warrant. That point is discussed with great ability in the notes to *Semayne's case*, in the first volume of Smith's Leading Cases, p. 45. It is contended that the illegal seizure of the goods on the Sunday rendered illegal the entry of the defendant on the Thursday, but the first seizure was abandoned by the fact of the officers afterwards going out of possession. The question, therefore, attempted to be raised for the plaintiff does not arise. If it did, we should have to consider the point. It appears that the defendant's assistants told the plaintiff that they had seized the goods, but it does not appear whether they excluded him from his house. Then the defendant took the goods on the Thursday. That, no doubt, was an interference in the matter, but unless he was a trespasser in the first instance, his act was valid, as he had a good warrant of distress directed to himself. The seizure

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on the Thursday was valid unless it was tainted by the original illegal taking on the Sunday. But it was not so tainted unless it can be shown that the doctrine as to illegal arrests applies to the case of goods. In the case of an illegal arrest, we should discharge the party out of custody. Here, the seizing the goods on the Sunday gave no additional facility to the seizing them on the Thursday. The defendant was entitled to take the goods at any time.

ALDERSON, B., and PLATT, B., concurred.

Rule refused.

Millward, on the following day, moved, on the part of the defendant, to enter the verdict on the issue on not guilty to the first count for him, on the ground that under the form of the declaration the plaintiff was not entitled to give in evidence any trespass after the premises had been left on the Tuesday evening. The question arises on the peculiar form of the declaration. It does not allege that the trespasses were committed on divers days and times, or in the old form "continuing the said trespass," but that the defendant on a given day broke and entered and continued and remained therein. It should have been that he trespassed on divers days and times. *Earl of Manchester v. Vale*, 1 Wms. Saund. 23. It points only to one trespass. In several cases it has been held that where the trespass was alleged with a *continuando*, evidence of other acts of trespass was admissible; but in all those cases there was a continuing trespass, or a continued repetition of trespasses. He referred to *Burgess v. Freelove*, 2 Bos. & P. 425; *English v. Purser*, 6 East, 395.

[PARKE, B. It is odd that there should be a distinction between continuing trespasses and continuing in a house trespassing. I cannot conceive any distinction.]

The allegation here is, that the defendant broke and entered on one day and continued in the house. That is not equivalent to an averment that the trespasses were continuing. A continuing trespass has a technical meaning. *Brook v. Bishop*, 2 Ld. Raym. 823; s. c. 7 Mod. 152; *Monckton v. Pashley*, Ibid. 974.

PARKE, B. I think it is impossible to draw the distinction contended for. I assume that in this case the defendant trespassed and went away not intending to return, but did afterwards return. That state of facts is within the declaration, which only means that the defendant trespassed on Sunday and on some other days. It is unnecessary to prove a continuous trespass.

POLLOCK, C. B., ALDERSON, B., and MARTIN, B., concurred.

Rule refused.

Nicholls v. Diamond.

NICHOLLS and others v. DIAMOND.¹

November 3, 1853.

Bill of Exchange — Acceptance — Want of Authority — Personal Liability.

A bill of exchange directed to the defendant thus: "To J. D., Purser, West Downs Mining Company," was accepted by him in these terms: "J. D. accepted *per proc.* West Downs Mining Company." J. D. was a member of the company, but was not authorized to accept bills on their behalf:—

Held, that he was personally liable, [although he stated at the time of accepting, that he would not be personally bound.]

ASSUMPSIT on two bills of exchange for 64*l.* 1*s.* each, drawn by the plaintiffs upon and accepted by the defendant.

Plea. *Non acceptavit.*

At the trial, before Talfourd, J., at the last Exeter Summer Assizes, the facts were these:— The defendant was the purser of the West Downs Mining Company and also a shareholder in the company, and the bill upon which the action was brought were directed to him thus: "To Mr. James Diamond, purser, West Downs Mining Company." The acceptance was in this form: "James Diamond, accepted *per proc.* West Downs Mining Company." The defendant, at the time of accepting the bills, stated that he would not be personally bound; and he was not in fact authorized by the company to accept bills. For the defendant, it was contended that the bills were not drawn according to the custom of merchants, and that he was not liable. The learned judge overruled the objection, being of opinion that the defendant was personally bound by his acceptance, and under his Lordship's direction the jury found a verdict for the plaintiffs for the amount claimed, leave being reserved to the defendant to move to enter a verdict for him.

Montague Smith now moved accordingly. The action is not maintainable on the bill by the custom of merchants. The company are not liable on this bill; and it would be hard to make the defendant responsible when he stated that he would not be personally liable, more especially as he could not have pleaded in abatement the non-joinder of the members of the company. Again, no party is liable as acceptor except the party to whom the bill is addressed, and the bill is addressed to the defendant as purser of the West Downs Mining Company. *Polhill v. Walter*, 3 B. & Ad. 114. and *per proc.* *Buckley in re Clarke*, 14 Mee. & W. 469.

[ALDERSON, B. The address to him in that form is description only]

¹ 23 Law J. Rep. (N. S.) Exch. 1. 2 Com. Law Rep. 111.

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PARKE, B. The bill is drawn on him individually, and he accepts it for the company of which he is a member. He is not the less bound because he accepts it for himself and others. He was not compelled to include the others; they are not bound, but he is.]

The plaintiff is seeking to fix a man individually who states expressly that he does not intend to bind himself.

[POLLOCK, C. B. He cannot take advantage of the firm, not being bound. He may bind himself.]

He cited *Bull v. Morrell*, 12 Ad. & E. 745.

[PARKE, B. Here is a bill directed to A by a certain description. A accepts it in his own handwriting, for himself and also for B, C, and D. Surely A is bound, although the three others may not be bound.]

POLLOCK, C. B. There will be no rule. In this case the defendant accepts for himself and others. Now, this he had no right to do, if either he were a member of a firm having no authority from the firm to accept bills, or if the bill had been accepted by him to pay his private debt. In this case he has accepted the bill for himself and a firm, having, in fact, no authority to accept it for the firm; but he cannot on that account be the less liable personally.

PARKE, B. I think the judge at the trial was right in the view he took of this case. The bill was directed to the defendant personally. He was the drawee, and he accepted the bill on behalf of the company. Now, if he were the agent for the company, and that company consisted of himself and five others, then he had the power to bind himself as principal and the others as agent. But, if he had no authority to bind the five, then he alone is bound as the drawee, being made liable by what he has signed in his own name. He cannot be agent for himself, and therefore he binds himself as principal.

ALDERSON, B. I am of the same opinion. The bill is drawn upon the defendant personally. He accepts it for himself and others. He is not entitled to accept it for others, but he has a right to accept it for himself. He does not the less accept the bill for himself because he had no right to accept it for others.

Rule refused.

Rastrick v. Derbyshire, Staffordshire, and Worcestershire Junction Railway Co.

RASTRICK v. THE DERBYSHIRE, STAFFORDSHIRE AND WORCESTERSHIRE JUNCTION RAILWAY COMPANY.¹

November 3, 1853.

Shareholders — Evidence — Register — Execution, Scire facias for.

An affidavit in support of an application under the Companies' Clauses Consolidation Act, 8 & 9 Vict. c. 16, for a *scire facias* for execution against a shareholder on a judgment against a railway company, stated that the deponent "having been foiled in his attempts to obtain a sight of the register, and so obtain authentic and official information on the subject, deponent instituted inquiries *aliunde* as to who really were the shareholders of the company, and hath been credibly informed by parties officially connected with the said railway, and which information deponent verily believes to be true, that the said J. F. F., who has been a director of the said company from the commencement, was a duly registered shareholder of seventy shares in the said company, and that 1,085*l.* was due thereon in respect of subscriptions not called up, the shares in the said company being 20*l.* shares, and only 4*l.* 10*s.* per share having been paid up or called : —

Held, that this affidavit unanswered was good *prima facie* evidence of the party being a shareholder of the company.

THIS was a rule calling on Sir J. F. Fitzgerald to show cause why a writ of *scire facias* for having execution on a judgment obtained by the plaintiff in this case, should not be issued against him as a shareholder in the Derbyshire, Staffordshire and Worcestershire Junction Railway, to recover the sum of 275*l.* recovered by the plaintiff by a judgment in this action. The rule was obtained under the 36th section of the 8 & 9 Vict. c. 16, the Companies Clauses Consolidation Act. That section is as follows : — "If any execution, either in law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up, &c.; and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid upon their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee."

The affidavit on which the rule had been obtained was in these terms : — "This deponent saith, that having been foiled in his attempts to obtain a sight of the registry, and so obtaining authentic and official information on the subject, deponent instituted inquiries *aliunde* as to who really were the shareholders of the company, and hath been credibly informed by parties officially connected with the said railway, and which information deponent verily believes to be true, that the said Sir John Foster Fitzgerald, who has been a director of the said company from the commencement, was a duly registered shareholder of seventy shares, and that 1,085*l.* was due thereon in

¹ 23 Law J. Rep. (N. S.) Exch. 2; 17 Jur. 977.

Richards v. Rose.

respect of subscriptions not called up, the shares in the said company being 20*l.* shares, and only 4*l.* 10*s.* per share having been paid up or called."

Tindal Atkinson showed cause. Sir J. F. Fitzgerald cannot be considered as being before the court at all, for the affidavit is not sufficient to give the court power to deal with this case. This question turns upon the 36th section of the 8 & 9 Vict. c. 16, which enacts that for the purpose of ascertaining the names of shareholders any person entitled to execution may inspect the register of shareholders. This course has not been taken by the plaintiff in this case. He has, on the contrary, resorted to mere hearsay evidence of Sir J. Fitzgerald being a shareholder. The affidavit does not entitle the plaintiff to make this application.

[PARK, B. The act of parliament does not preclude a creditor from obtaining other evidence than the register of a party being a shareholder. Is there any answer to this part of the affidavit?]

No affidavit in answer has been made, and it is submitted that none is requisite.

[PLATT, B. Surely that is sufficient, the plaintiff's affidavit being unanswered. A good *prima facie* case has been made out.]

Selfe, in support of the rule, was not called upon.

Per Curiam.¹ The rule must be absolute.

Rule absolute.

RICHARDS v. ROSE.²

November 12, 1853.

Easement — Party Walls — Mutual Right of Support — Damages — New Trial — Compromise by Jury.

Where the owner of land builds houses upon it, adjoining each other so as to require mutual support, there is, either by a presumed grant, or by a presumed reservation, a right to such mutual support, and such right is not affected by subsequent subdivision of the property.

Therefore, where B., the owner in fee, demised land to P. on a building lease, and P. erected two houses adjoining each other, and subsequently underleased to W., who mortgaged the two houses, and the assignee of the mortgagee under a power of sale, sold one house to the plaintiff, and subsequently sold the other to the defendant, it was

Held, that the plaintiff was entitled to maintain an action against the defendant for excavating under his own house, and removing his own soil, whereby the plaintiff's house was deprived of support, and sank.

¹ POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

² 23 Law J. Rep. (N. S.) Exch. 3; 9 Exch. Rep. 218; 17 Jur. 1036; 2 Common Law Rep. 311.

Richards v. Ross.

A new trial will not be granted on the ground that from the small amount of damages, the jury must have come to a compromise, unless, from the circumstance of the case, it is evident that there has been a total refusal on the part of the jurors to discharge their duty, and the verdict is necessarily wholly inconsistent.

THE first count of the declaration alleged that the plaintiff was possessed of a messuage or dwelling-house adjoining a messuage and dwelling-house of the defendant, and was entitled to have the same supported by the messuage and premises of the defendant, yet the defendant wrongfully dug and excavated his premises and unlawfully made a drain, hole, and tunnel, and removed and took away part of his, the defendant's land, and thereby deprived the plaintiff's messuage of the support to which it was entitled. A second count alleged that the defendant so negligently dug, excavated, and tunnelled a certain drain, &c., that the walls of the plaintiff's house cracked, sank, gave way and subsided. The defendant pleaded that the plaintiff was not entitled to have her house supported by the defendant's land and premises adjoining.

At the trial, before the Chief Baron, at the Sittings for Middlesex, after Trinity term, it appeared that the plaintiff was the owner of the lease of the house No. 6 Alfred Place, Camden Town, and the defendant held the lease of the adjoining house, No. 5. The site of both houses was originally the freehold of one Alfred Batson, who demised the same on a building lease to S. O. Pierce, and the two houses were built. There was no evidence as to which house was built first. Pierce, by separate leases, dated the 20th of August, 1847, sub-let to E. Watmough for ninety-nine years. Watmough shortly afterwards mortgaged the two houses at the same time to J. B. Brown, who, on the 20th of October, 1847, assigned the mortgage to H. Halliday. Halliday, under a power of sale, sold the two houses by auction, and No. 6 was purchased by the plaintiff, the conveyance bearing date the 11th of July, 1849. The defendant was in like manner the purchaser of No. 5; his conveyance bore date the 3d of September, 1849. When the houses were built there was no sewer under them. The defendant, with the consent of the commissioners of sewers, constructed one under his own house, and communicated with the street sewer, and this was the cause of the action. A verdict was found for the plaintiff, damages 25*l.*, with leave to the defendant to move to enter a verdict for him if the court should be of opinion that there was no such right to the support of the adjoining soil as alleged.

Lush,¹ moved accordingly, and also for a new trial, on the ground that the verdict was against evidence. The question is simply, whether the defendant had the right contended for; as there was no evidence of carelessness to support the second count of the declaration.

[PARKE, B. Did not the mortgagee, by making one assignment before the other, in effect grant a right of support?]

¹ Nov. 8, before POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

Richards v. Rose.

If it depended upon priority, it would be a question which house was first built, and there was no evidence on that point.

[PARKE, B. Both houses may have the right of support, the one by the other.]

There is no decision to the effect, that where two leases are granted at the same time, any right of support exists.

[PARKE, B. Here the legal interest is combined and vested in one mortgagee. Could not he carve out parcels and rights as he pleased?]

No; not to the prejudice of the original lessor. The lease to the defendant conveyed "all the rights, members, and appurtenances, and all the estate, right, and title of the mortgagee."

[PARKE, B. Does not the lessor by implication grant or reserve a right to easements, whether it be the right of support or lights? Is it contended that the defendant could, under similar circumstances, block up lights? I do not see that any different rule exists as to the support of houses. Priority does not make any difference. Each should enjoy the support of the other. There was a similar case moved before us a term or two ago.]

MARTIN, B., referred to *Pinnington v. Galland*, 22 Law J. Rep. (N.S.) Exch. 348; s. c. 20 Eng. Rep. 561.]

He then urged as an additional ground for a new trial, that the damages were so small that the jury must have given their verdict as a compromise, and without any real agreement of opinion.

Cur. adv. vult.

Judgment was now delivered by

POLLOCK, C. B. In this case the rule will not be granted upon the point reserved, because it seems very clear that where a number of houses are built upon a spot of ground all belonging to the same person, and all built together, and obviously requiring mutual support, each of the other, for the purpose of their common protection and security, whether the owner parts first with one and then with another, or parts with two together, and afterwards sub-divides either by mortgage, or sale, or devise, or in any other way, it should seem necessary as a matter of common sense that the circumstance of whether the houses were separated at one time or at different times never could make any difference as to what ought to be the result, inasmuch as the houses were originally built depending upon each other, and each required the assistance of the other. It seems a matter of plain common sense that that must continue, and that no man who becomes possessed of one of the houses by any means whatever can be in a situation to say to his neighbors, "You are not entitled to the protection of my house. I will pull my house down, and let the houses on each side collapse and fall into the ruins of my own." It seems to me impossible not to come to the conclusion, that the law must be in strictness with what is so plain and sensible. There is a case, however, of *Pinnington v. Galland*, decided in this court in July last, which comes pretty much to the same result, although it has reference to a right of way, and not a right to support. We are

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all of opinion that where houses have thus been erected in common by the same owner on a spot of ground necessarily requiring their mutual support, either by a presumed grant or by a presumed reservation, the same mutual dependence of each house on the rest remains, and therefore there is no foundation for the point reserved, that the house had not a right to the support of the neighboring houses, and the rule will be refused. If the court had been of opinion, under such circumstances, that there was no evidence that the one house was entitled to the support of the other, a rule would have been granted to enter the verdict for the defendant.

There was another point raised, namely, that the damages found were only 25*l.*, whereas the injury probably was as much as between 100*l.* and 200*l.*, and that the verdict of the jury must, therefore, have been some compromise or other which required revision. It appears to us, however, that although there are cases where that principle would prevail, as for instance if there was an action on a bill of exchange, and there was only one plea that the bill was forged, and the jury found a verdict for the plaintiff damages one farthing, compromising the matter by finding that the bill was not forged and yet giving the plaintiff only one farthing, the court, I think, would there see that there had been a total refusal on the part of the jurors fairly to discharge their duty, and the verdict would be necessarily wholly inconsistent. That, however, is not quite the case where there are damages; and I remember very well, pressing on the jury that they were by no means to consider all the damage that ensued to be the result of this injury, because some of it might have arisen from the house being built upon a foundation that gave way, and there was some color for that view of the subject. The court, therefore, are of opinion that if they were to grant a rule on that ground it could not be granted except on payment of costs, and with that condition, or with that term the defendant's counsel expressly said he did not desire to have a rule; therefore, there will be no rule upon that ground, and the rule will be refused on the other, inasmuch as the court think the point reserved ought to be decided in favor of the plaintiff.

Rule refused.

FLOWERS v. WELCH.¹

November, 17, 1853.

Writ of Trial — Notice of Trial — Issue and Issues — Time to Reply — Irregularity.

The defendant having obtained time to plead, taking short notice of trial, if necessary, before the sheriff, delivered two pleas on the 5th of August, whereupon the defendant on the 10th

¹ 23 Law J. Rep. (N. S.) Exch. 7; 9 Exch. Rep. 272.

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delivered a replication joining issue on the pleas, and on the following day delivered the issue with notice of trial indorsed to try the issue before the sheriff on the 18th. The defendant having returned the issue and notice of trial, and the cause having been tried in his absence, it was objected that the plaintiff was not entitled to give short notice of trial; and that the word "issue" had been improperly used for "issues":—

Held, that the writ of trial was good.

THIS was a rule calling on the plaintiff to show cause why the writ of trial and all subsequent proceedings should not be set aside for irregularity. The declaration, which was for use and occupation, having been delivered on the 23d of July last, the defendant obtained an order for four days further time to plead, taking short notice of trial, if necessary, before the sheriff. On the 5th the defendant delivered two pleas. On the 10th the plaintiff delivered a replication, joining issue on the defendant's pleas, not having been able to obtain it from his pleader at an earlier period. On the 11th the plaintiff delivered the issue with notice of trial indorsed thereon to try the issue before the sheriff on the 18th. This issue the defendant returned on the 12th, stating the notice to be informal. The trial took place on the 18th, and the defendant not appearing, the plaintiff obtained a verdict. The rule was obtained on two grounds—1st, that the notice of trial was bad, as it was a notice to try the issue instead of the issues. 2dly, that short notice of trial was not "necessary," inasmuch as the plaintiff was not entitled to take five days to add the *similiter*.

Garth, for the plaintiff, showed cause. There is no weight in the first objection, for, although there are two pleas in this case, there is, in truth, but one issue, which is a divisible one. The rule was obtained on the authority of *Towers v. Turner*, 4 Dowl. & L. P. C. 177, but that case is not an authority against the plaintiff, since the language of the court as to this point was extra-judicial. (He was then stopped by the court.)

Barnard, in support of the rule. The plaintiff was bound to give a longer notice of trial. He had no right to take five days for the mere purpose of adding the *similiter*.

[ALDERSON, B. A special replication might have become necessary.]

POLLOCK, C. B. He took the time the law gave him to reply. Why is he to be hurried in delivering his replication because the defendant obtains a long time to plead. The regular practice of the court brought the plaintiff to the 9th of August. If he was unable to give ten days' notice he was at liberty to give four.

PARKE, B. The defendant by obtaining further time to plead cannot deprive the plaintiff of a privilege that he possessed before.]

The case of *Towers v. Turner* is in point. Besides, the form given in the Common Law Procedure Act uses the words "issue or issues."

[PARKE, C. This is in truth but one issue.]

POLLOCK, C. B. The legislature having abolished special demur-

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ers, it is quite time for courts of justice to act upon what parties understand to be the meaning of the language they employ. Here the parties must have understood that they came to try all the issues raised on the record. We ought to act in the spirit of the legislature, which by abolishing special demurrers meant to intimate that weight ought not to be given to mere matters of form and technicality. The legislature has discountenanced such a course, and as no one has been misled by this notice of trial, it would be discreditable in the court to give effect to the objection raised by the defendant. The rule will be absolute for a new trial, on payment of costs by the defendant.

PARKE, B. I am of the same opinion. There is, in truth, but one issue in the case.

ALDERSON, B. To give effect to this objection would, in effect, be to allow special demurrers in matters of practice. The decision of the Court of Common Pleas was delivered at a time when special demurrers existed.

PLATT, B., concurred.

Rule absolute on payment of costs.

COUNTY COURT APPEAL.

Figg, appellant, WILKINSON, respondent.¹

November 14, 1853.

County Court — Appeal — Signing Imperfect Case.

A county court judge, in settling a case for an appeal, directed that a certain document should be inserted, and he signed the rough draft upon the understanding that the document was to be set forth in the fair copy. The draft was also sealed with the seal of the county court. The judge afterwards refused to sign the fair copy containing the document, he then considering that he was *functus officio* by having signed the improper draft:—

Held, that the judge was not *functus officio*, but that he ought to sign and send up the perfect case.

In this instance a rule *nisi* had been obtained to strike out the county court appeal, on the ground that two copies of the case had not been left at the rule office within three clear days of the sealing and signing of the case by the judge, pursuant to the 163d rule of the new Rules of Practice of the County Courts.

The following facts appeared from the affidavits:—Wilkinson, the

¹ 23 Law J. Rep. (N. S.) Exch. 5. Before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

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respondent, had brought a plaint in the County Court for the breach of a warranty of the soundness of a horse, and had recovered 50*l.* damages. The defendant appealed against the decision. The parties, not agreeing in the case to be stated, went before the County Court judge on the 1st of July, and he then settled the case, and directed that the receipt for the price of the horse, which contained the terms of the warranty, should be inserted in the case, and that the summons should also be set out. The judge then signed the draft case, upon the understanding that these two documents would be set out in the fair copy, and he stated that he would sign the fair copy when it was presented to him. This draft case was also sealed with the seal of the court. It was not until the 4th of July that the defendant's attorney got the receipt from the plaintiff's attorney; after obtaining which, the defendant's attorney prepared the fair copy of the case, and inserted both the documents above mentioned, and in a few days presented it to the judge for his signature. The latter, however, answered that, whatever he might have said before, he now considered himself *functus officio*, and he declined to sign the case. The appellant therefore brought into court the rough draft case so signed and sealed. No copies of that case had been sent to the rule office within three days after the draft had been signed and sealed.

Bramwell showed cause. The court will not strike out this appeal, but will hear it and decide it. It is clear the case which ought to be brought before the court is the settled case which the judge promised, but afterwards refused, to sign. If the court cannot take that as the case, they will hear the case argued on the original rough draft which was signed by the judge. It is through the fault of the respondent alone that the appellant was not able to comply with all the requisites of the practice of the court, and serve the copies of the case in due time.

Cripps, in support of the rule. The general rules of practice of the county courts are made under the statute, and are as imperative as an act of parliament. This court has no power to dispense with any of them. It is required by those rules that two copies of the case, signed and sealed by the judge, should be left at the rule office within three days after the case is signed. This has not been done.

[PARKE, B. The judge has not signed any perfect case. He intended the receipt and summons to be inserted.]

He has signed one case, and he has refused to sign any other. This court has no power to compel him.

[PLATT, B. This rough draft is not a proper case to be presented to this court.]

ALDERSON, B. Surely you do not wish to compel the other side to apply for a *mandamus* to compel the judge to sign a case. We have no doubt, and must presume, that the judge will send up a proper and perfect case on hearing our opinion that he ought to do so.]

The court will also presume that the judge had good reasons for

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his refusal. The plaintiff has had no opportunity of answering the **affidavits** on the other side.

POLLOCK, C. B. The rule must be enlarged to next term, and **an** intimation should in the mean time be given to the judge that he **ought** to send up a perfect case. If, knowing all the facts and our **opinion**, he still decline to do so, the appellant must adopt such **measures** as he shall be advised to take.

Rule enlarged.

EADON v. ROBERTS.¹

November 24, 1853.

Practice — Declaration, Filing and Service of Notice of — Common Law Procedure Act — Appearance sec. stat.

A plaintiff who files a declaration within one year after the process is returnable, is to be deemed out of court, within the Reg. Gen. Hil. term, pl. 35, unless he also serves notice of declaration within the same period.

On the 13th of April, 1852, the plaintiff issued his writ of summons. On the 24th of October, the Common Law Procedure Act came into operation. On the 13th of November the plaintiff entered an appearance for the defendant *sec. stat.*, and filed a declaration, and on the 12th of November, 1853, gave notice of declaration : —

Held, that the appearance *sec. stat.* was good, and that the declaration ought to be set aside.

THIS was a motion for a rule calling on the plaintiff to show cause why the declaration and all subsequent proceedings should not be set aside for irregularity. The ground of the application was that the notice of declaration had not been given until the expiration of twelve months after the service of the writ, within the meaning of the Regent General Hilary term, 2 Will. 4, pl. 35, which declares that "a plaintiff shall be deemed out of court unless he declare within one year after the process is returnable." The writ of summons was served on the 13th of April, 1852. On the 24th of October the Common Law Procedure Act, 15 & 16 Vict. c. 76, came into operation. On the 13th of November following an appearance was entered for the plaintiff *sec. stat.*, and a declaration filed on the same day. On the 12th of November, 1853, the notice of declaration was served on the defendant.

Quain, in support of the motion, contended that neither under the old nor under the new practice since the passing of the Common Law Procedure Act, could the declaration be considered as filed until notice had been given, and consequently by the Regent General

¹ 23 Law J. Rep. (N. S.) Exch. 8; 9 Exch. Rep. 227.
35 *

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Hilary term, 3 Will. 4, pl. 35, the plaintiff, not having declared within a year after the process was returnable, was to be deemed out of court.

Willes showed cause in the first instance. The question is, not at what time the notice of declaration was given, but at what time the declaration was filed; and here the filing took place within a year after the return of the process. It is true that for certain purposes a declaration is not good unless notice of it has been given, but this is not such a case. The rule is thus laid down in *Archibald's Practice*, p. 191; a notice of declaration "may be served at any time before a *non pros.* is actually signed within the year after the return of the process." In support of that position, *Worley v. Lee*, 2 Term Rep. 112, and *West v. Radford*, 3 Burr. 1452, are cited.

[PARKE, B. The court in the latter case appear to think, a party, to keep himself within the rule relating to declarations, must serve notice of declaration within the year.]

The law is laid down in similar terms in *Lush's Practice*.

[PARKE, B. I think the declaration must either be served, or where it has been filed, notice of it must be served within the year. The case of *Worley v. Lee* confirms this view. A defendant is not bound to go perpetually to the office to search for a declaration. He has no information that any declaration has been filed. He is justified in going away under the supposition that the proceedings are at an end.]

Suppose it is found impossible to serve the defendant.

[PARKE, B. In that case the plaintiff may stick the notice up in the office.

PLATT, B. In *Tidd's Practice*, p. 456, it is said, "If the declaration be filed and notice thereof given to the defendant or his attorney, it is deemed to be a good declaration from the time of such notice only; and, therefore, a rule to plead in such a case given before notice of declaration is irregular."

PARKE, B. The declaration is not to be considered as such, unless it is brought to the notice of the defendant within the year.

ALDERSON, B. You cannot be said to have declared until you have either delivered the declaration to the defendant or have given him notice of it.

PARKE, B. The plaintiff is too late. To "declare" means to tell a defendant what the plaintiff is proceeding for. At an early period of the law a plaintiff informed his adversary of his cause of action *ore tenus*; subsequently he put it upon paper and delivered it; and then came the practice of filing the declaration and making the defendant acquainted with the fact by a notice.

ALDERSON, B. The language of Buller, J., in *Worley v. Lee*, points the same way. The argument there was, that a declaration was not well delivered till notice, and that view of the case was adopted by that learned judge.]

Secondly, the rule applicable to this case has been repealed by the Common Law Procedure Act, 15 & 16 Vict. c. 76, which came into operation on the 24th of October.

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[ALDERSON, B. The previous practice as to this point has been re-enacted by the 58th section.

MARTIN, B. This is not the case of a declaration under the present form.

PARKE, B. By the Reg. Gen. Hill. term, 1853, all written rules are annulled "except as regards any step or proceeding heretofore taken." This is a "proceeding heretofore taken."]

Thirdly, this is a good declaration under the Common Law Procedure Act. By the 26th section of the Common Law Procedure Act, appearance, according to 12 Geo. 1, c. 29, is abolished. Then, by the 28th section, in case of non-appearance, the plaintiff may file a declaration with notice to plead, and compel the defendant to plead without receiving any notice of declaration. Then, if no notice of declaration is necessary, the defendant is too late in his application to this court. *Goodliffe v. Neaves*, 8 Exch. Rep. 134; s. c. 14 Eng. Rep. 419.

[PARKE, B. The statute 12 Geo. 1, c. 29, is in force as to all previous proceedings.]

Quain, in support of the rule, was not called on.

Per Curiam. The appearance is right, and the defendant is clearly wrong. The rule must be absolute, without costs.

Rule absolute, accordingly.

EMERY v. WEBSTER.¹

November 3, 1853.

Amendment — Judge's Order — Payment into Court — Money taken out of Court by Mistake.

The plaintiff having agreed to act at the defendant's theatre for the season of 1853, which ended in September, at 8*l.* per week, and having been dismissed, brought an action, on the 23d of April, for a wrongful dismissal, claiming to receive 32*l.* for four weeks' salary up to that day. The defendant pleaded payment into court of 32*l.*, to which the plaintiff replied, taking that sum out of court, under the mistaken supposition that he would be afterwards entitled to recover for each week's salary as it should become due. Having discovered his mistake, he applied to a judge, who made an order for setting aside the replication, the plaintiff paying the costs, and repaying the money received out of court and costs, the plaintiff to be at liberty to amend the declaration and particulars, and the defendant to plead *de novo* : —

Held, that the judge exercised a proper discretion in making the order.

THIS was a rule calling on the plaintiff to show cause why an order of Parke, B., should not be rescinded. It appeared that the plaintiff,

¹ 23 Law J. Rep. (N. S.) Exch. 9; 9 Exch. Rep. 212.

Emery v. Webster.

who was an actor, had in the year 1851 made an engagement to act at certain theatres, of which the defendant was the manager, on the terms of being paid 8*l.* per week for the season 1852-3, which ended in September, 1853. The plaintiff remained in the defendant's service until about the 2d of April, when he was dismissed, and on the 23d of April brought an action against the defendant to recover the sum of 32*l.* indorsed upon the writ, being the amount of four weeks' salary from the 19th of March to the 23d of April. The declaration was framed in special assumpsit for improperly dismissing the plaintiff. The defendant pleaded payment of 32*l.* into court, to which the defendant on the 24th of May replied, taking that sum out of court, and on the 26th the costs were taxed and paid by the defendant. The money was taken out of court by the plaintiff under the impression that he would be entitled to bring an action and recover for each week's salary as it became due, from the 23d of April to the 29th of September, 1853, when the season of 1852-3 closed. The plaintiff afterwards discovering that he would not be entitled to recover up the 29th of September, applied on the 1st of June to Parke, B., at chambers, who made the following order: "I do order that the replication herein and all the plaintiff's subsequent proceedings thereon be set aside, on payment of all costs, to be taxed, the plaintiff to repay to the defendant or his attorney the money received out of court, and also the costs received; and I further order that the plaintiff be at liberty to amend the declaration and particulars of demand in this action, the defendant being at liberty to plead *de novo*."

Hawkins, for the plaintiff, showed cause. The money paid into court by the defendant having been taken out by the plaintiff under a mistaken notion that he would not be precluded by such act from recovering his salary at it should become due at the end of each week up to September, 1853, the judge was right in making the present order, for the plaintiff ought to be permitted to withdraw his replication and reply damages *ultra*. He made the application to the judge at chambers at the earliest opportunity after the discovery of his error. (He was then stopped by the court.)

Bramwell and *Wordsworth*, for the defendant, in support of the rule. It cannot be denied that the plaintiff took out the money by mistake; but after costs have been taxed, and the amount paid, it is too late for the court to rectify the error.

[PLATT, B. The plaintiff has made a blunder, and desires to set it right, offering an indemnity to the defendant. Is not that course just? The plaintiff has made a mistake in his pleading: ought he not to be permitted to rectify it?]

It is a bargain improvidently made, and ought to be binding.

[PARKE, B. This is the case of a bargain made in error, and carried into effect through the medium of pleading. Surely if a wrong plea has been pleaded, the court ought to set the matter right.]

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POLLOCK, C. B. I think this rule must be discharged. [His lordship stated the facts, and proceeded.] The plaintiff, having discovered that after taking the money out of court he would not be entitled to proceed for the recovery of the rest of his demand, applied within a reasonable time to set aside the proceedings on payment of costs and to retrace his steps. There can be no doubt that the judge at chambers had authority to make the order in question, and at the time of application for the rule, the only point was as to the soundness of the discretion exercised by him. There can be no doubt that the learned judge exercised a sound discretion in the matter. I remember a case relating to the cancelling of a bill of exchange. There the acceptance had been cancelled by mistake, and yet it was held that the error might be rectified and the bill be made available. Here the application was made in a few days after the discovery of the mistake, and was made within a reasonable time. The rule must be discharged, and as this is an unsuccessful appeal, it must be discharged with costs.

PARKE, B., concurred.

ALDERSON, B. I think the order was properly made. The courts have often gone much further than we are now asked to go. This is like the case where we are in the habit of amending writs in order to save the statute of limitations. In that case, according to the argument urged by the defendant's counsel, the party has an advantage. But although he has an advantage, he is not allowed to keep it, as such a course would be contrary to justice. Those cases go further than the present.

PLATT, B. I agree with the rest of the court, and am unable to distinguish this case from that put by my brother Alderson relating to the statute of limitations. It has been said that an advantage has been fairly gained by the defendant; but if the advantage has been fairly gained, it cannot be fairly kept. I doubt, however, whether the advantage can be said to have been fairly obtained. If the defendant thought that 32*l.* was a fit sum to be paid in respect of the whole of the plaintiff's claim, why did he not obtain a judge's order in the first instance to stay all proceedings on payment of that sum and costs. In this case the plaintiff supposed that after taking out of court the money paid in, he was entitled to proceed for the remainder. He afterwards, however, found out his blunder, and then he asks to be allowed to proceed for the residue of his demand on indemnifying the defendant. Nothing can be more reasonable than this. It is clear that the judge had power to make this order, and that he exercised a sound discretion in making it.

Rule discharged, with costs.

Austin v. Llewellyn.

AUSTIN v. LLEWELLYN.¹

November 7, 1853.

Ejectment — Tenant in Tail — Bar of Claim — Evidence.

A claimant in ejectment proved that his grandfather being seised in fee of a farm, devised it to the claimant's father, as tenant in tail, and died in 1799, and that the father received the rents and profits up to the year 1807, and died in 1850 :—

Held, that the claimant's father having been barred under the 3 & 4 Will. 4, the claimant was barred also.

EJECTMENT under the Common Law Procedure Act, 15 & 16 Vict. c. 76, to recover possession of land and premises called "Angeltown Farm," in the county of Glamorgan.

At the trial, before Platt, B., at the last Glamorganshire Summer Assizes, the facts were as follows: John Austin, the grandfather of the claimant, being seised in fee of the farm in question, by will dated 1798, devised it to his "son Thomas during his natural life, and after his decease to the heirs of his body lawfully begotten, forever. The testator having died in 1799, his son Thomas, the father of the present claimant, became possessed of the farm, and received the rents and profits thereof up to the year 1807. He died in 1850, leaving the present claimant, his son and heir, him surviving. This being the evidence on the part of the claimant, it was contended for the defendant, that the father of the claimant having been barred by reason of his having been out of the possession of the rents and profits of the farm from 1807 to 1850, the claimant was barred also. The learned judge was of this opinion, and the claimant was accordingly nonsuited.

B. Thomson now moved to set aside this nonsuit, and for a new trial. The claimant was entitled to succeed. The case is governed by *Doe d. Smith v. Pike*, 3 B. & Ad. 738. There the heir in tail brought ejectment against a defendant who had been in receipt of the rents thirty years during the life of the ancestor in tail, and seven years after his death the ancestor had had seisin; and it was held that such possession by the defendant was no bar to the action and that the lessor of the plaintiff was not bound to rebut the presumption arising from such possession by showing that the ancestor had not conveyed by fine and recovery.

[PARKE, B. That case was decided before the late act. 3 & 4 Will. 4, c. 27. There the title of the plaintiff began at the death of the father: that decision has nothing to do with the present case.]

The question turns upon the construction to be put on the 2d, 3d, and 21st sections of the 3 & 4 Will. 4, c. 27. The case of *Cannon v. Rimington*, 21 Law J. Rep. (N. S.) C. P. 137; s. c. 10 Eng. Rep.

¹ 23 Law J. Rep. (N. S.) Exch. 11; 9 Exch. Rep. 276; 2 Com. Law Rep. 408.

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77, applies. There a tenant in tail, in 1798, made a feoffment of the lands entailed, and received some of the profits of the land entailed up to his death in 1831; and it was held that his issue in tail was entitled to his writ of *formedon* within twenty years of the death of the tenant in tail. In that case, Jervis, C. J., in delivering the judgment of the court, says, "It is contended that the 21st section is applicable to this case: and no doubt if the tenant in tail had voluntarily abandoned his interest during his life, and had remained out of possession for twenty years, the issue in tail would have been barred; but although there may be an apparent hardship in the case, and a difficulty in understanding why in principle such a distinction should exist, we are of opinion that the 21st section does not apply to this case, and that the right of the issue in tail to make an entry or bring an action to recover the land, cannot be barred by reason of the same not having been made or brought, in a case where the tenant in tail has conveyed away his own right, and has put it out of his power to make an entry or bring an action.

[ALDERSON, B. All that a tenant may bar by his own act, he may bar by his neglect.]

The son of a tenant in tail stands in a different position from the tenant in tail himself.

[PARKE, B. The claimant is bound by the neglect of his ancestor. If the tenant in tail is barred, the son of the tenant in tail is barred also. It was incumbent on the claimant to prove his title within twenty years by perception of rent and profits, or by acknowledgment or otherwise; and as he has failed to do so, he is barred.]

The tenant in 1807 may have made a conveyance for life, and this presumption ought to be made.

[PARKE, B. The plaintiff's father would have been barred if he had brought ejectment, and the plaintiff is barred also. The case of *Cannon v. Rimington* is distinguishable, as that was a case of discontinuance.]

The question is, whether the proof of possession is to come from the plaintiff or from the defendant.

[ALDERSON, B. The tenant in tail had been out of possession for more than twenty years. If he had claimed to recover the land he would have been barred, and, therefore, his issue is barred also.]

[PARKE, B. The plaintiff was bound to make out affirmatively that his father was entitled to recover.]

The plaintiff's case is this, that there is nothing more than absence of proof of the receipt of rent.

[POLLOCK, C. B. There is a total absence of all proof of possession on the part of the claimant's father since 1807.]

PARKE, B. The claimant did not adduce any evidence of his title, and therefore it was a good answer *prima facie* that no title had been shown since 1807.]

POLLOCK, C. B. There will be no rule in this case, for the reasons that have been given during the argument.

PARKE, B., ALDERSON, B., and PLATT, B., concurred.

Rule refused.

Evans v. Simon.

COUNTY COURT APPEAL.

EVANS AND WIFE, Appellants, v. SIMON, Respondent.¹

November 14, 1853.

Limitations, Statute of — Acknowledgment.

W. J., who had previously lent to the plaintiff 200*l.*, which was secured by the promissory note of the plaintiff and two sureties, had goods from the plaintiff's shop to the value of 17*l.* The plaintiff, on remitting to W. J. 10*l.* for interest on the money borrowed, sent with it his bill for 17*l.* for the shop goods. W. J. answered — "I beg to acknowledge the receipt of 10*l.* cash and the bill amounting to 17*l.*, both of which sums I have placed to your credit. I have enclosed your bill; receipt it, and return it me by post." At the death of W. J., and more than six years after the supplying of the goods, and when one of the sureties had paid the defendants the amount of the promissory note, the plaintiff sued the defendants as representatives of W. J., to recover the 17*l.* The defendants relied on the Statute of Limitations:—

Held, that the letter of W. J. was a sufficient acknowledgement to take the case out of the statute.

THIS was an appeal from the decision of the judge of the County Court of Carnarvon, held at Conway.

On the 2d of May, 1853, Simon, the plaintiff below, sued the defendants as representatives of one W. Jones, deceased, the female defendant being his administratrix. The action was brought to recover the sum of 17*l.* 7*s.* 4*d.* for goods sold and delivered, as to which the defendants gave notice that they should take advantage of the Statute of Limitations. It appeared that the plaintiff had borrowed of the intestate in 1845 the sum of 200*l.*, which was secured by the promissory note of the plaintiff himself and two sureties. On the 19th of July, 1847, the plaintiff remitted the intestate the sum of 10*l.* on account of interest due on the note, and at the same time sent in to the intestate his bill of the shop goods for the sum of 17*l.* 7*s.* 4*d.* The intestate wrote in answer the following letter, dated the 19th of July, 1847:—

"Dear Simon, — I beg to acknowledge the receipt of 10*l.* cash, and the bill amounting to 17*l.* 7*s.* 4*d.*, both of which sums I have placed to your credit. I have inclosed your bill; receipt it, and return it me by post. — Yours truly,
"W. JONES."

It did not appear whether the plaintiff had sent back the bill receipted or not. In February, 1853, after the death of W. Jones, an action was brought by the defendants against the plaintiff and his sureties to recover the 200*l.* and interest, and it was settled by one of the sureties paying the amount due, and on the settlement credit was given

¹ 23 Law J. Rep. (N. S.) Exch. 16; 9 Exch. Rep. 282. Before POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

or the 10*l.*, but not for the 17*l.* 7*s.* 4*d.* The county court judge, on the trial before him, considered that under the circumstances the letter of W. Jones was a sufficient acknowledgment to prevent the operation of the Statute of Limitations, and he gave judgment for the plaintiff for 17*l.* 7*s.* 4*d.* The question for the Court of Appeal was, whether the judge was correct in his conclusion. If so, judgment was to remain for the plaintiff; if otherwise, to be entered for the defendants.

Willes, for the appellants. The letter of the intestate does not take the case out of the Statute of Limitations, the 9 Geo. 4, c. 14. To effect that there ought to be an acknowledgment of the debt, and an absolute, not a conditional, promise to pay it contained in the letter, or to be inferred from its language. *Rutledge v. Ramsay*, 8 Ad. & E. 221; *Hart v. Prendergast*, 14 Mee. & W. 741. The letter either amounts to evidence of actual payment, or it is merely an offer to set off. The plaintiff clearly intends to deal with the 17*l.* 7*s.* 4*d.* as he deals with the 10*l.* It would be absurd to suppose that he meant to promise to pay back the 10*l.*, so is it very difficult to say that the same words which he uses in respect of the 10*l.* should bear a different signification when applied to the other sum. *Ashby v. James*, 11 Mee. & W. 542, shows that the 10*l.* was actually extinguished by payment. So, if the plaintiff had returned the bill receipted, thus showing his acceptance of the offer of the deceased, there would also have been evidence of payment of the 17*l.* 7*s.* 4*d.* Taking the latter part of the letter into consideration, the true legal construction of it is, that it was a conditional promise to pay the 17*l.* 7*s.* 4*d.* The intestate in effect says, I will pay your bill by setting off the amount against an equal portion of the 200*l.* you owe me, if you assent to the arrangement. If the claim of the intestate to the 200*l.* had been wholly unfounded, possibly it might have been construed into an absolute promise; but as it was an undisputed demand, it clearly cannot be so treated. *Williams v. Griffith*, 3 Exch. Rep. 335; *Waller v. Lacy*, 1 Man. & G. 54. There is no promise to pay the amount at any future time.

J. Brown, for the respondent. The letter contains an unqualified acknowledgment of the debt. From this the court may infer a promise to pay. Had the letter contained an express promise to pay by striking off an equivalent portion of the 200*l.*, no doubt such an inference could not be made. But here there is no such expressed limited promise. (He was here stopped by the court.)

POLLOCK, C B. We are bound to put a reasonable construction upon this letter, not looking at it too astutely. I take it that the intestate meant to say, "I have received the goods, I owe you the account, and I propose, as a convenient mode of payment, that I should set it off against the 200*l.* which you owe me." It does not appear whether the plaintiff assented to that proposal. I cannot read this letter as stating any limited and particular mode of payment

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which would do away with the effect of an acknowledgment of the obligation to pay. The letter says, as I understand it, that if the payment is not made in this method the writer will pay in any other way.

PARKE, B. I am disposed to put the same construction on the letter that the Lord Chief Baron has done. I think, on the whole, that it imports not a conditional promise, but an absolute promise, coupled with a suggestion as to the mode of payment.

ALDERSON, B. I am not satisfied that the county court judge was wrong.

PLATT, B., concurred.

Appeal dismissed

DE CRESPIGNY v. DE CRESPIGNY.¹

November 21, 1853.

Covenant — Separation Deed.

In a deed of separation, there was the following covenant by the defendant, the father of the children therein named: That, for providing for the maintenance of the children, he would, out of his own moneys, pay the whole expense of their education, maintenance, and support, except as thereafter mentioned, all of whom it was agreed should be and remain in the custody and under the complete control of the defendant. Then followed a proviso, that the mother of the children, or her trustees, should pay the expense of the education, maintenance, and support of such of the children as should be from time to time permitted by the defendant to reside with the mother, during the period of such residence:—

Held, that the covenant by the defendant to maintain, was general, and not limited to the minority of the children, or to the period of their remaining under his control and custody.

THE declaration stated, that the defendant, on the 29th of July, 1841, by a certain indenture then made, covenanted with the plaintiff that he, the defendant, would thenceforward, out of his own moneys, pay the whole expense of the education, maintenance, and support (except as thereafter mentioned) of the three children of the defendant and Caroline De Crespigny his wife, provided that the said Caroline De Crespigny, or if she should fail to do so the trustees or trustee for the time being of the said indenture, should (and they or he were required so to do) out of their own moneys and income, or the income thereby provided for her separate use and maintenance, pay the expense of the education, maintenance, and support of such of the said children as should or might from time to time be permitted by the defendant to reside with her, during the period or

¹ 23 Law J. Rep. (N. S.) Exch. 27; 9 Exchequer Rep. 292; 2 Com. Law Rep. 484.

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espective periods of such residence with her. Breach, that although after the making of the said indenture, for one year ending on the 25th of March, 1853, and before the commencement of this suit, during which period neither of the children hereinafter next mentioned resided with her mother, the reasonable expense of the education, maintenance and support of two of the said children, to wit, &c., amounted to the sum of, to wit, 200*l.*, of which the defendant had notice, yet he has not paid the said expense or any part thereof.

The defendant pleaded, setting out the indenture at length. It was made between the defendant of the first part, Caroline his wife of the second part, the plaintiff of the third part, and F. D. Nesham and J. S. Windham of the fourth part. After various recitals as to the property of Caroline De Crespigny before her marriage with a former husband, and the trusts of their marriage settlement, as to the marriage with the defendant, and as to certain deeds executed by the said Caroline De Crespigny and the defendant, by which a separate provision was made for Caroline De Crespigny, and certain trusts were created, it recited that there were three daughters issue of the second marriage, that differences had arisen between the defendant and his wife, and a separation had been agreed upon, and the plaintiff had agreed to give an indemnity to the defendant in respect of any debts contracted by the said Caroline after the 24th of June, 1840; and by the said deed it was witnessed that certain policies of insurance and annuities and other property were assigned by the said defendant and his wife to the parties of the fourth part, upon certain trusts. The deed then contained a covenant on the part of the defendant, that Caroline, his wife, should be allowed to live separate; and it then proceeded thus: — And for providing for the maintenance of the children of the said Herbert Joseph Champion De Crespigny and Caroline De Crespigny, it is hereby covenanted and agreed between them as follows, (that is to say) the defendant, &c., doth covenant and agree with the said plaintiff, that he, the said defendant, shall and will henceforward, out of his own moneys, pay the whole expense of the education, maintenance, and support, except as hereinafter mentioned, of the said three daughters of him and the said Caroline De Crespigny (all of whom it is agreed shall be and remain in the custody and under the complete control of the said defendant); provided always, that the said Caroline De Crespigny, or if she should fail to do so the trustees or trustee for the time being of these presents shall, and they or he are hereby required so to do, out of her own moneys and means, or the income hereby provided for her separate use and maintenance, pay the expense of the education, maintenance, and support of such of the said children as shall or may from time to time be permitted by the said defendant to reside with her during the period or respective periods of such residence with her; and in consideration of the premises the said plaintiff, for himself and on behalf of the said Caroline, covenanted and agreed that she should live separate and not endeavor to compel the defendant to cohabit with her, or to make any allowance or provision for her support and maintenance, and to keep the defendant indemnified from all claims on

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account of the said Caroline. The plea concluded with an averment that, after the making of the said indenture, and before the commencement of the said period of one year in the declaration mentioned, ending as therein mentioned, the said two children mentioned in the declaration attained the full age of twenty-one years, and each of them respectively attained the full age of twenty-one years, and that neither of them was, during the same period, or any part thereof, in the care or custody or under the control of the defendant.

Demurrer and joinder.

Pashley, in support of the demurrer. The intention of the deed was to make a provision for the children different from that which they were entitled to by law, and the words "support and maintenance" are not to be limited to the period of education, which may be naturally considered to extend to the whole of the minority of the children. He cited D, lib. 27, tit. 11. "De Alimentis," and *Code Civil*, lib. 1, c. 5, s. 203, as to the meaning of maintenance. With respect to the other defence intended to be raised by the plea, that the covenant is only in force while the children are under the care and control of the father, the agreement that they shall remain under his care and control is collateral to the covenant and in no way qualifies it. He cited Bac. Abr. tit. "Covenant."

The court then called upon —

Hugh Hill, contra.—The operation of the covenant declared on is limited by its language, as explained by the context, to the period of minority. Education, maintenance, and support are to be provided, and each of these three words must be confined to the same period. It could not have been intended that the education was to last after the children had respectively obtained their majority, or that the defendant was to provide for their maintenance after that time or after their marriage. The exception made in the deed as to the period when the children were living by the defendant's permission with their mother, also shows that the period for maintenance was that during which the children were subject to the father's authority. According to the construction contended for, the husband would be obliged by the covenant to maintain the children, although the wife obtained possession of them against his consent, which could not have been the intention of the parties.

POLLOCK, C. B. We are all agreed that our judgment must be for the plaintiff. Without reference to the authorities that have been cited from the Roman and French law, it is plain that it is a general covenant to maintain the children, and that it has been broken; and it is no answer to say that the children were of age.

PARKE, B. If the intention of the parties was what is contended for on the part of the defendant, they have not so expressed it. The covenant is to pay the whole expense of the education of the child-

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en, which would be for the usual period, and the whole expense of their maintenance and support. It is not limited to maintenance during the period of education, and it is for general purposes of support and maintenance without reference to their minority. The words of agreement cannot be turned into words of condition, and the covenant therefore is not confined to the period during which the children are under the control of the father.

ALDERSON, B., and PLATT, B., concurred.

Judgment for the plaintiff.

IN THE EXCHEQUER CHAMBER.

BUNBURY, Bart. v. FULLER.¹

June 25, 1853.

Tithe — Twenty Years' Perception — Decision of Tithe Commissioner on Claim of Exemption — Inclosure Act, and Award.

Debt for not setting out tithes. The plaintiff was originally lay impropriator of the tithes of certain fen lands in the parish of M., which were from 1816 down to the time of the action occupied by the defendant. An act for inclosing lands in the parish of M., gave an option to the Inclosure Commissioners to make an allotment to the impropriator in lieu of these tithes. By their award, made in 1812, they stated that they had procured to be made an accurate survey and plan of the waste lands to be inclosed, and of the ancient inclosed lands, (except the fen lands,) and then proceeded to allot to the impropriator certain allotments in lieu of and as a compensation for all the tithes growing and renewing within M., and due unto him. A schedule and also a map or plan were annexed to the award, but neither comprised the defendant's lands, or the fen lands. From 1816 to 1828, the defendant had paid no tithes to the plaintiff in respect of his land, but for a period of twenty years from 1828, the defendant had either paid tithes in kind, or compounded for them to the plaintiff. In 1841, on an Assistant Tithe Commissioner being sent down with a view of awarding a sum to be paid as a commutation of the tithes of the parish of M., the defendant claimed that his lands were exempt from tithes by virtue of the Inclosure Act and award; but the Tithe Commissioner decided that his lands were not thereby exempted: —

Held, that the perception of the tithes for twenty years, gave the plaintiff no title to them under the statute 3 & 4 Will. 4, c. 27.

Held, secondly, that the decision of the Assistant Tithe Commissioner, was not conclusive against the exemption, since s. 90 of the Tithe Commutation Act, the 6 & 7 Will. 4, c. 71, took away his jurisdiction, if the tithes had been extinguished by virtue of the Inclosure Act, and that he could not give himself jurisdiction by deciding that they were not so extinguished.

Held, lastly, that though the award professed to give the allotment in lieu of all the tithes in M., yet as the commissioners had an option whether they would extinguish all the tithes, and as there was evidence on the face of the award, maps, and surveys, that the fen lands were not taken into consideration, it was a question for the jury whether the award in reality awarded any compensation to the plaintiff for the tithes on the defendant's land.

¹ 23 Law J. Rep. (N. S.) Exch. 29. Before COLERIDGE, J., WIGHTMAN, J., MAULE, J., CRESSWELL, J., WILLIAMS, J., and CROMPTON, J.

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THIS was a writ of error on a bill of exceptions to the ruling of Erle, J.

The action, which was brought in the Court of Exchequer, was debt for tithes by a lay impropriator. The first count was for not setting out the tithe of hay in the year 1848. The second count was a like count in respect to the tithe of corn and grain, in the year 1850. There was a third count for tithes bargained and sold.

Pleas to the first two counts, *nil debet* by statute: to the third, *nunquam indebitatus*. Issue was joined on these.

The plaintiff was the owner of the tithes of certain lands in the parish of Mildenhall, in the county of Suffolk, and was entitled to tithes of the portion of land (about twenty-nine acres) in Mildenhall Fen, in the same parish, occupied by the defendant, unless that right was taken away by the effect of a certain act for inclosing lands in the parish of Mildenhall, and of an award made under it. The act was passed in the 43 Geo. 3. By s. 18, the commissioners were authorized and required to make allotments in a peculiar manner to the impropriator, vicar, and other parties named, "in lieu of all tithes both great and small, and all moduses, compositions, and other payments in lieu of tithes, and all ecclesiastical dues and payments (except Easter offerings, mortuaries, and surplice fees,) arising, growing, renewing, increasing, happening, or payable within Mildenhall aforesaid." But subsequent sections, especially s. 20, threw a doubt upon the absolute power and duty of the commissioners to make compensation in lieu of all tithes in all cases.¹ In the award, which was made in 1812, the enclosure commissioners stated that a true and exact survey, admeasurement, and plan of all the lands to be divided, allotted, and enclosed, and of all messuages, &c., and ancient enclosed lands within the parish of Mildenhall (except such as were situate within the fens of the parish) had been made by the direction of the commissioners; that they had considered the claims of all proprietors of estates in the parish of Mildenhall to rights and interests in the waste grounds of the parish directed by the act to be divided, allotted, and enclosed; and that they had considered, viewed, and valued the lands in the survey. They then proceeded to "allot unto and for Sir T. C. Bunbury, bart., in lieu of and as a compensation for all the tithes growing and renewing within Mildenhall aforesaid, and due unto the said Sir T. C. Bunbury, all those three several pieces of land," &c. There was annexed to the award a schedule described as "A schedule of the old inclosures, warrens, and other lands within the said parish, not discharged from tithes referred to in our award, to which this is annexed." There was also a map or plan annexed to the award, which was not a map of the whole parish, but contained a map of all lands in the schedule, and of all lands allotted or exchanged under the award; but neither the survey nor the map included the defendant's lands.

¹ The provisions of the act are so very special and confused, that it is not considered worth while to set them forth, or to state the arguments or judgment respecting them, further than is necessary to elucidate the other matters in the case.

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Sir T. C. Bunbury entered into and enjoyed the allotment given him by the award, and after his death the plaintiff succeeded to his rights and enjoyed it also. It appeared also that for twelve years, from 1816, when the defendant first became occupier of the lands in question, down to 1827, both inclusive, no tithes had been paid in respect of this land of the defendant's in Mildenhall fen, though during all those years it produced corn, hay and grain: but that for twenty years subsequent to 1828 they had either paid tithes of corn, grain and hay in kind in respect of this land to the plaintiff, or had compounded for them with him. The plaintiff had also since 1832 received like tithes from other fen lands in the immediate neighborhood of the defendant's land. The annual value of the tithes from the defendant's lands was less than 20*l.* a-year.

It was admitted that the defendant had not set out his tithes for the two years mentioned in the two first counts.

The plaintiff also gave in evidence that an Assistant Tithe Commissioner appointed under the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, was sent down for the purpose of awarding the sum to be paid by way of rent-charge in lieu of tithes of Mildenhall parish; that the defendant before him claimed that his lands were exempt from tithe by virtue of the Enclosure Act and award; that the assistant tithe commissioner signed and published his decision in December, 1841, that they were not so exempted. It did not appear that the tithe commissioners had taken any further proceedings towards the commutation of the tithes of the parish, or that they had confirmed the above decision.

The defendant relied on the Enclosure Act and award as barring the plaintiff's claim.

The plaintiff contended that the Enclosure Act and award were not admissible in evidence, or if admissible were not conclusive against him, on the ground that the Mildenhall fen lands were not included in the award, and that no compensation was awarded in respect of them; consequently that the tithes of the fen were not extinguished; and that if it was to be taken that they were within the effect of the award that the award was bad, as it appeared on the face of the award, survey, and map, that no compensation had been given to the lay impropriator, or any one else, in respect of the tithe of the fen land. He further urged, that the assistant tithe commissioner's decision to the effect that the Mildenhall Enclosure Act and award did not exempt the defendant's land from tithes, was conclusive in his, the plaintiff's favor; and he lastly submitted, that the twenty years' perception of the tithe, from 1828 to 1848, was conclusive evidence of his title to them.

The judge ruled that the award was a good award, and that the Enclosure Act and award barred the plaintiff's claim; and he directed the jury to find for the defendant. The plaintiff tendered a bill of exceptions to this ruling.

The case was argued (June 15 and 16) by

B. Andrews, for the plaintiff. The case shows that the plaintiff

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took the tithes of these fen lands for twenty years. That is conclusive evidence of a title to them under the statute 3 & 4 Will. 4, c. 27; s. 2 of which says, "that no land or rent shall be recoverable but within twenty years after the right of action accrued." The interpretation clause, s. 1, includes under the term "land" all tithes belonging to a lay owner; and section 34 takes away the old title and extinguishes it, and confers it on the party who has had the twenty years' perception of the profits, giving him, as it were, a parliamentary title to them. *Doe d. Jukes v. Sumner*, 14 Mee. & W. 39; *Doe d. Carter v. Barnard*, 13 Q. B. Rep. 945; *The Incorporated Society of Dublin v. Richards*, 1 Dru. & W. 258; *Scott v. Nixon*, 3 Dru. & W. 388. The case of *The Dean, &c., of Ely v. Cash*, 15 Mee. & W. 617 is not against us, as there no adverse title was set up.

[CRESSWELL, J. To make that provision applicable you must assume that somebody is entitled to the tithes. The defendant does not contend for any estate in the tithes himself.]

He claims to be exempt; that is, to be entitled to them himself. The tithes exist. The lands are not tithe free. They are not merged in the land. They are payable either to the plaintiff or the defendant.

[COLERIDGE, J. Do you mean to say that if the Mildenhall Enclosure Act and award extinguish these tithes, the twenty years' perception of them would re-create them?]

After paying them for twenty years the defendant is estopped from saying they are extinguished.

[MAULE, J. Suppose you could show that for one hundred years after the reign of Richard the First certain lands were not tithable, the perception of tithes from them ever since would not make them tithable now.]

The statute 3 & 4 Will. 4, c. 27, would make them tithable.

[MAULE, J. That statute was passed against tithes, and not for them. With regard to land the title must be in some one; but that is not the case with regard to tithes. You say the defendant's right to the tithes was extinguished. But he never had any right to the tithes.]

Secondly, the Mildenhall Enclosure Act and award are no bar to the plaintiff's claim. The act, it is submitted, did not relate to the fen land. The award did not intend to extinguish these tithes. If the language would have that effect the award is bad, as there is no survey or map including the fen land, which is required by the General Enclosure Act, 41 Geo. 3, c. 109, s. 4, which is incorporated in the private act; and no compensation is given in lieu of the tithes of the fen land. Thirdly, the decision of the assistant tithe commissioner is conclusive in favor of the plaintiff, that the defendant's land is not exempted from tithes by the Enclosure Act and award. The Tithe Commutation Act, 6 & 7 Will. 4, c. 71, by section 45, provides that the decision of the tithe commissioner on all claims of exemption from tithe "shall be final and conclusive on all persons, subject to the provisions hereinafter contained."

[MAULE, J. The "provisions hereinafter contained," may mean

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the provision of section 90, which says that the act shall not apply to any lands the tithes whereof have been commuted or extinguished under any act of parliament.]

The “provisions hereinafter contained” merely mean the granting of an issue under section 46; when that section does not apply the decision is final. Section 90 only applies to the case of undisputed commutation or extinguishment. If there be a dispute, or question, or suit, respecting such extinguishment, the commissioner must decide it, or otherwise there are no means of carrying out the provisions of section 45, and there never could be a final determination or commutation of the tithes of a parish. If the commissioner’s decision is not final the decision of a court of law would not be final. There can be no appeal or issue obtained in this case, as the amount is under 20*l*. The assistant tithe commissioner has decided that section 90 does not apply to this case.

O’Malley, for the defendant. The Enclosure Act and award bar the plaintiff’s claim. It was intended that the commissioners should give compensation in lieu of all tithes in the parish, and the award professes to do so. The want of a survey or map does not vitiate the award. There might have been made beforehand other sufficient maps and surveys of the fen lands. If so, the commissioners were not bound to make new ones. The act does not oblige them to append any plan or map to the award. Secondly, the tithe commissioners’ decision is not conclusive. The tithe commissioners cannot decide questions of title. *Regina v. The Tithe Commissioners*, 15 Q. B. Rep. 620; s. c. 10 Eng. Rep. 408; *Edwards v. Bunbury*, 3 Q. B. Rep. 885. The right to the tithe is not altered by the decision of the assistant commissioner — section 9. That decision, by section 45, is to be final, “subject to the provisions hereinafter contained,” that is, to all subsequent clauses. Section 46 applies only to the case of those who can appeal, that is, where the amount in dispute is above 20*l*. yearly value; but section 90 takes away the jurisdiction of the tithe commissioners altogether to deal with tithes of lands already commuted or extinguished by any act of parliament. “Tithes,” in this act, means uncommuted tithes — section 89. The tithe commissioner cannot give himself jurisdiction by saying that the Enclosure Act does not apply. *Lilley v. Harvey*, 5 Dowl. & L. P. C. 648; *Thompson v. Ingham*, 14 Q. B. Rep 710. Thirdly, the twenty years’ perception of tithes does not give the plaintiff any title.

[COLERIDGE, J. We need not trouble you on that point.]

Worlledge replied, and cited *Thorpe v. Cooper*, 2 You. & J. 445; *Cooper v. Walker*, 4 B. & C. 36; *Wetherell v. Weighell*, 3 You. & C. 243; *Wetherell v. Bellwood*, 3 You. & C. 319; *Girdlestone v. Stanley*, 3 You. & C. 421, and the statute 5 & 6 Vict. c. 54, s. 9.

Cur. adv. vult.

The judgment of the court was now delivered by

COLERIDGE, J. This case comes before us upon a bill of excep-

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tions. It was an action of debt for tithes of hay, corn, and grain of certain lands in the parish of Mildenhall, in the county of Suffolk. The counts were in the usual form, and the pleas were *nil debet*, by statute, and never indebted, on which issues were joined.

No question was made on the general title of the plaintiff as the improper rector, or on the liability of the defendant as occupier, during the periods covered by the declaration, unless he were protected in the manner hereinafter to be considered; and it was proved that for twenty years, from 1828 up to 1847, both inclusive, he had either set out or compounded for his tithes from the land in question, which consisted of between twenty-nine and thirty acres of fen land. Of land of this description, and called by that name, there were about 9,700 acres in the parish, out of about 16,000, which the whole parish contained; and from other lands of the same description it was proved, that the plaintiff had, from 1832 continually to the commencement of this suit, received either tithes in kind or a money composition; but the defence of the defendant rested on an enclosure act, and the award made under it. More than one answer was attempted to this defence, assuming that *prima facie* it protected the defendant; but if upon examination the ruling of the learned judge at Nisi Prius cannot be sustained, it will be unnecessary to consider this; and we are of that opinion.

The act in question passed in the 47 Geo. 3, and it is entitled "An act for enclosing lands in the parish of Mildenhall, in the county of Suffolk." Its preamble recites, among other things, that in the parish there are several open and common fields, commons, commonable meadows, heaths, and waste ground; that Sir Thomas Charles Bunbury, whom the present plaintiff now represents, is entitled, among other things, to the great or rectorial tithes, and divers lands, tenements, and hereditaments in the parish; that certain other individuals named, are entitled to other portions of the tithes of divers other lands; and divers other persons are seised of lands which are tithe free. It then recites, that there are certain rights of sheep-walk, common of stackage, and other rights and interests in, over, and upon, the said open and commonable fields, commons, commonable meadows, heaths, and waste ground, and that the same heaths, fens, and waste ground, in their then present state, yield but little profit, and that it would be an advantage to the several persons entitled thereto, if the before-mentioned rights be extinguished, and the said lands and grounds were divided and allotted. It further recites the General Enclosure Act, and then it proceeds to the enacting clauses. It should be observed that the word "fens" is but once introduced into this preamble, and then only as forming part of the open, unenclosed, and commonable lands which are to be enclosed, and it was not disputed that in this place the word did not apply to the Mildenhall Fen, with respect to which the present question arises. [His lordship then stated the two sections of the act on which the question of its construction turned.] The language of these clauses is so obscure, that we have had much difficulty in coming to a conclusive opinion upon its meaning; but it appears to us, that taking the two together,

an option was left in respect of the old enclosures, and that the statute did not cast upon the commissioners the obligation of making a compulsory commutation of all the tithes in the parish. Further, upon the part of the plaintiff it was contended, that in fact the commissioners had not taken into account the Mildenhall fen land at all. The conclusion we have come to upon the sections of the act of parliament, leaves it open to us to enter into this inquiry, the commissioners having in their award adopted the words of the act; and if we see reason to believe that the option was not exercised, and that the commissioners had not taken into account the Mildenhall fen lands, then the award which they made is no bar to the plaintiff's right to recover. The award which they should make in respect of tithe compensation is, indeed, subject to an appeal to Quarter Sessions, by the 55th section of this act; and a neglect to appeal in any case in which a grievance is the proper subject of appeal, will have the effect of making the judgment, if not so questioned in proper time and manner, as final as if it had been confirmed by an appellate court. But it has been rightly determined in *Cooper v. Walker*, and in error in *Thorpe v. Cooper*, that where the grievance is the total omission to give any compensation in respect of a distinct interest or subject-matter, the party is not bound to appeal, although he may, under the same enclosure act, and by the same award, have received compensation in respect of other subject-matters. The judgments there were distinguishable from the present, and the plaintiff here cannot rely upon the operation of the saving clause, which is so narrowly worded that it does not seem to embrace his case. But the commissioners' jurisdiction depends on their having awarded compensation; as to the amount, subject to appeal, they are to be the judges; but, unless they award compensation, they have no authority to deal with the subject-matter. In the judgment of the court, in *Thorpe v. Cooper*, it is said, "the commissioners not having made any compensation for the tithes of Weedenham, (a township in the parish to which the Enclosure Act applied,) must either have rejected a claim which they were directed to compensate, or from inadvertence have omitted to make compensation for it. In the first case, they have exceeded their authority; in the second, they have omitted to do what they were expressly required to do. In either view of the case, their award is void as to all such interests as are affected by their exceeding their jurisdiction, or by their omission. A party is not concluded by not appealing against a nullity." This is extremely reasonable. If the commissioners in the present case had for any reason omitted to take a district of 9,900 acres of tithable land into account, nothing would be more unjust than the plaintiff should be barred by their award as to an unquestionable right, before it was made, simply because it awarded him a compensation for tithes of land of a different class, and situated in other parts of the parish. See also the judgment of the Court of Queen's Bench on the second point in the case of *Ex parte the Overseers of the Poor of Birmingham*, 18 Law J. Rep. (N. S.) M. C. 89. We are, therefore, with this view of the statute, and looking at the general words of the award, to inquire

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into the fact as it is to be collected from the evidence stated in the bill of exceptions; premising that by the General Enclosure Act, 41 Geo. 3, c. 109, s. 4, the commissioners were required to make a true, exact, and particular survey, admeasurement, plan, and valuation of all the lands and grounds to be divided, allotted, and enclosed, and also of all the messuages, cottages, orchards, gardens, homesteads, ancient enclosed lands, and grounds within the parish. The requirements of this section are very minute; the number of acres and decimal parts of acres are to be specified; the property distinguished; the persons who made the survey and valuation, are to certify upon oath; and they are to be open to be inspected and copied by all persons interested. Turning to the award, which was given in evidence by the defendant, we find the commissioners declaring that there has been made "a true, exact, and proper survey, admeasurement, and plan of all the open and common fields, commons, commonable meadows, heaths, and waste grounds, to be divided, allotted, and enclosed, and also of all messuages, cottages, orchards, gardens, homesteads, and ancient enclosed lands and grounds, within the parish, except such as are situate within the fens of the said parish. To the award is annexed a schedule of old enclosures, warrens, and other lands within the parish not discharged from tithes, and in this the defendant's lands, in the first and second counts of the declaration mentioned, are not comprised. It contains about 309 acres of land, and a large warren called Mildenhall Warren. The award has also annexed to it a map, but, as it is stated, it is not a map or plan of the whole parish, but only of all the lands comprised in the schedule, the lands allotted and exchanged, and some of which are fen lands. In the award itself, the commissioners profess to make allotments to the plaintiff in lieu of, and as a compensation for, all the tithes growing and renewing within Mildenhall, and due unto him. The date of the award is of the 1st of May, 1812. These circumstances, with the facts, that for twelve years from 1816, the defendants had paid no tithe in respect of the lands mentioned in the declaration, and then for twenty years, as before stated, had either paid them in kind, or compounded for them, and that the plaintiff had also received them in kind, or by commutation from other lands in the neighborhood, are the premises from which the jury would have to draw the conclusion, in fact, whether or not the commissioners awarded any compensation to the plaintiff in respect of the tithes now claimed.

The learned judge appears to have considered the Enclosure Act and award final and conclusive, and leaving no question for the consideration of the jury, because the act gave the commissioners power to deal with the whole question, and their award professes in terms to give allotments for all the plaintiff's interest as tithe owner. But we cannot agree that this was conclusive. We think there was much evidence to show that, in fact, they had not taken into account the fen land at all; we think it is rather to be inferred, that for some reason or other they had thrown it out of their consideration entirely. It is scarcely credible that if so large a tract of land had been admeasured, surveyed, mapped, and valued, there would not have ap-

peared some positive and specific evidence of it in the award or schedules. We are not called upon, however, to express any positive opinion upon the conclusion of fact to be drawn; it is enough to say that we think that the ruling of the learned judge, on this point, cannot be sustained, and that a *venire de novo* must be awarded. We have thus far said nothing upon another point on which the plaintiff placed great reliance, and in respect of which the direction of the learned judge is objected to on the bill of exceptions.

It appears that the whole matter of the Enclosure Act and award had been before the assistant tithe commissioner acting under the 6 & 7 Will. 4, c. 71, and that he had determined that the tithes were not barred by them, and that this decision had not as yet, so far as appeared, been confirmed by the tithe commissioners, and nothing more had been done under it. This decision, however, the counsel for the plaintiff contended was final and conclusive as to the point decided; the learned judge ruled that it was not. It is not necessary for us, after the conclusion we have come to on the Enclosure Act and award, to decide this point; but it may be convenient for us to state how we conceive the law to be, for the guidance of the judge who may, on a future occasion, have to deal with the question. By the 43d section of the 6 & 7 Will. 4, c. 71, certain matters are to be heard and decided by the commissioners or assistant commissioner, of which this question would be one; and the decision of the one or the other, without any distinction between the two, is by the section made final and conclusive on all persons "subject to the provisions in the act hereinafter contained." The last words, in our opinion, point clearly to the provisions which immediately follow, in the 46th section, for trying a feigned issue, or stating a case for the decision of a superior court. These are provisions by way of appeal; and the verdict or judgment in the one or the other binds not only the parties, but the commissioners or assistant commissioner in the former proceedings as to the commutation. These may, however, in the present case, be laid out of consideration. But independently of the 46th section the 90th imposes a restraint on the jurisdiction of the tithe commissioners, among others, in the case of "lands and tenements the tithes whereof shall have been already perpetually commuted or extinguished under any act of parliament heretofore made." Now, it is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the superior court. Then, to take the simplest case — suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits. On its be-

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ing presented, the judge must not immediately forbear to proceed, but must inquire into that preliminary fact, and for the time decide it, and either proceed or not with the principal subject-matter according as he finds on that point; but this decision must be open to question, and if he has improperly either forborne or proceeded on the main matter in consequence of an error on this, the Court of Queen's Bench will issue its mandamus or prohibition to correct his mistake. To apply this to the present case: there can be no doubt, we conceive, that the jurisdiction of the assistant tithe commissioner, was well initiated. He came to a parish in which *de facto* tithes were paid in kind or by compensation, but he was met with an objection which, if well founded, in fact showed that he had no jurisdiction. He was bound to inquire into that fact; he did so, and decided against the objection, and thereupon proceeded with the commutation. But the learned judge was quite right in ruling that his decision was not final and conclusive. If, upon a further inquiry, the tithe commissioner shall be found to have been correct in determining that the tithes of these lands had not been commuted or extinguished under the Enclosure Act, then all that he has done thereupon will, under the 45th section, be conclusive, subject only to the qualification arising out of the 46th section. On the other hand, if that inquiry should terminate in sustaining the award, all that he has done will have been *coram non judice*. Thus much we have thought it convenient to say on this point.

The point made by the learned counsel for the plaintiff, on the twenty years' perception, was disposed of in the course of the argument. The judgment will be for a *venire de novo*.

Venire de novo.

WHITE, executor of JOHN BLUETT, deceased, v. WILLIAM BLUETT.¹

November 21, 1853.

Contract — Consideration — Promise.

To an action on a promissory note given by the defendant to his father, the defendant pleaded that he, the defendant, had just grounds to complain of the distribution that his father had made of his property, as his father had admitted; and that it was therefore agreed between them that the defendant should cease for ever to make any such complaint, and that in consideration thereof, his father would discharge him from liability on the note and the cause of action in respect thereof; and that the defendant's agreement should be accepted in full satisfaction and discharge, and that it was so accepted:—

Held, that the plea was bad, as not showing any consideration for the promise by the father.

THE declaration contained a count upon a promissory note made by the defendant payable to the testator, and a count for money lent

¹ 23 Law J. Rep. (N. S.) Exch. 36; 2 Common Law Rep. 301.

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Plea, as to the said first count, and as to so much of the residue of the declaration as relates to money payable by the defendant to the said J. Bluett for money lent to the defendant, that the said note in the said first count mentioned was delivered by him to the said J. Bluett as in the declaration supposed, and by the said J. Bluett taken and received from the defendant for and on account of the said money so payable to the said J. Bluett as in this plea mentioned, and the causes of action in respect thereof, and by way of securing the same, and for or on account of no other debt, claim, matter, or thing whatsoever. And the defendant further saith, that the said J. Bluett was the father of the defendant, and that afterwards, and after the accruing of the causes of action to which this plea is pleaded, and before this suit, and in the lifetime of the said J. Bluett, the defendant complained to his said father that he, the defendant, had not received at his hands so much money or so many advantages as the other children of the said J. Bluett, and certain controversies arose between the defendant and his said father, concerning the premises, and the said J. Bluett afterwards admitted and declared to the defendant that his, the defendant's, said complaints were well founded, and, therefore, afterwards, &c., it was agreed by and between the said J. Bluett and the defendant, that the defendant should forever cease to make such complaints, and that in consideration thereof, and in order to do justice to the defendant, and also out of his, the said J. Bluett's, natural love and affection, towards the defendant, he, the said J. Bluett, would discharge the defendant of and from all liability in respect of the causes of action to which this plea is pleaded, and would accept the said agreement on his, the defendant's, part, in full satisfaction and discharge of the said last-mentioned causes of action; and the defendant further saith, that afterwards, and in the lifetime of the said J. Bluett, and before this suit, he, the said J. Bluett, did accept of and from the defendant the said agreement as aforesaid, in full satisfaction and discharge of such mentioned causes of action.

Demurrer and joinder.

Bovill, in support of the demurrer. The plea is not good as to either count. There is no consideration for giving up the claim on the money count, and there is no discharge of the liability on the note.

[PARKE, B. By the law merchant the holder may discharge the acceptor of his liability, if he sufficiently expresses his intention not to insist upon payment; but there is no such intention here averred.]

T. J. Clark, in support of the plea. The plea shows an agreement by the defendant, and that in consideration of such agreement the father agreed to forego the debt.

[PARKE, B. Is an agreement by a father, in consideration that his son will not bore him, a binding contract?]

The plea avers that the complaints were well-founded. The adequacy of the consideration for a promise is not a matter of inquiry. A promise is a good consideration for a promise, if the promisee takes upon himself a liability which did not before attach to him. Here

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the son had a right to make the complaints mentioned, and his agreeing to forego that right and abstain from doing what he legally might do is a good consideration, because he would have been liable to an action if he had broken his promise. It falls exactly within the definition of a consideration in *Chitty on Contracts*, p. 28, as the defendant subjected himself to an obligation by his promise, and also to a detriment by not being able to continue his well-grounded complaints. A binding agreement with mutual promises is a good accord. He cited *Com. Dig.* tit. "Accord" (B,) 4, and *Haigh v. Brooks*, 10 Ad & E. 309.

POLLOCK, C. B. The plea is clearly bad. By the argument a principle is pressed to an absurdity, as a bubble is blown until it bursts. Looking at the words merely, there is some foundation for the argument, and, following the words only, the conclusion may be arrived at. It is said, the son had a right to an equal distribution of his father's property, and did complain to his father because he had not an equal share, and said to him, I will cease to complain if you will not sue upon this note. Whereupon the father said, if you will promise me not to complain I will give up the note. If such a plea as this could be supported, the following would be a binding promise: A man might complain that another person used the public highway more than he ought to do, and that other might say, do not complain, and I will give you five pounds. It is ridiculous to suppose that such promises could be binding. So, if the holder of a bill of exchange were suing the acceptor, and the acceptor were to complain that the holder had treated him hardly, or that the bill ought never to have been circulated, and the holder were to say, Now, if you will not make any more complaints, I will not sue you; such a promise would be like that now set up. In reality, there was no consideration whatever. The son had no right to complain, for the father might make what distribution of his property he liked; and the son's abstaining from doing what he had no right to do can be no consideration.

PARKE, B. I am of the same opinion. The agreement could not be enforced against the defendant. It is not immaterial also to observe, that the testator did not give the note up. It was formerly doubted whether a simple agreement could be pleaded in bar. *Lynn v. Bruce*, 2 H. Black. 317, but there have been many modern cases into which third persons have been parties to the agreement, and the agreement has been held to be an answer, and it may be that such an agreement would do, although third persons were not parties to it. But that question does not arise here, as there was no binding agreement at all by the defendant.

ALDERSON, B. If this agreement were good, there could be no such thing as a *nudum pactum*. There is a consideration on one side, and it is said the consideration on the other is the agreement itself: if that were so, there could never be a *nudum pactum*.

PLATT, B., concurred.

Judgment for the plaintiff.

Viner v. Hawkins.

VINER v. HAWKINS.¹

November 25, 1853.

Insolvent — Payment to procure Release when arrested in Respect of Fraudulent Debts.

Where an insolvent is adjudged to be discharged as to a particular creditor at a future period, and is arrested by that creditor, a payment of part or all of the debt to obtain his discharge from the arrest, is valid, although a fresh security given under the same circumstances would be invalid.

Quære, whether money paid under such invalid security can be recovered back?

THIS was an action brought by the plaintiff to recover from the defendant the sum of 15*l.* under the following circumstances: In the year 1852, the plaintiff being indebted to the defendant in the sum of 59*l.* 15*s.* filed a petition and schedule in the Court for relief of Insolvent Debtors under 1 & 2 Vict. c. 110. The defendant was therein inserted as a creditor for that amount. At the hearing he opposed the plaintiff's discharge, and the plaintiff was adjudicated to be discharged forthwith as to all his debts in the schedule excepting the debt due to the defendant, and as to that debt he was adjudicated to be discharged at the expiration of seven calendar months from the date of his vesting order. The plaintiff was not detained in prison at the suit of the defendant, his opposing creditor, and having settled with his detaining creditor he came out of prison. The defendant then issued a *capias* under the 2 & 3 Will. 4, c. 39, against the plaintiff, upon which he was arrested and taken to prison. Negotiations were then entered into with the defendant for the plaintiff's release, and it was ultimately agreed that the plaintiff should consent to a judge's order to pay debt and costs by instalments, and he signed a consent of which the following is a copy:

"In the Common Pleas. *Hawkins v. Viner*. We consent to an order to stay herein on payment of 63*l.* 4*s.*, the debt for which this action is brought, in manner following; namely, 13*l.* 14*s.* down, and 3*l.* 8*s.* the agreed costs on the 16th inst., and the balance by monthly payments of 5*l.*, the first payment of 5*l.* to be made on the 9th April next; immediate judgment, but with stay of execution unless default be made in any payment as above."

The defendant, having paid the 13*l.* 14*s.* mentioned in the consent, together with 1*l.* 6*s.* costs of the *capias*, was released. On default in one of the instalments judgment was signed, and the defendant was arrested, but discharged on an application to Williams, J., on the ground that the new security for the debt which was discharged by the adjudication was void. This action was then brought, and at the trial, before Martin, B., at Westminster, at the sittings after Trinity

¹ 23 Law J. Rep. (N. S.) Exch. 38; 9 Exch. Rep. 266; 2 Com. Law Rep. 288.

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term, the plaintiff was nonsuited, his lordship holding that the money was a voluntary payment, and could not be recovered back.

A rule *nisi* for a new trial on the ground of misdirection was subsequently obtained, against which cause was shown by

Knowles, and Massy Dawson. The plaintiff is not entitled to recover this money, which was paid by him voluntarily and with full knowledge of his legal rights. Although according to the decisions it has been held that a new security given by an insolvent for a debt from which he has been discharged cannot be enforced, (*Ashley v. Killick*, 5 Mee. & W. 509,) the authorities do not show that he can in any case recover the amount back if he chooses to pay such debt. The 1 & 2 Vict. c. 110, s. 91,¹ does not in terms forbid the payment of a debt. Indeed a payment under such circumstances as these is really within the spirit of the Insolvent Act. By the 85th section it is enacted that an insolvent ordered to be discharged at a future period "shall be subject and liable to be detained in prison, and to be arrested and charged in custody at the suit of any one or more of his or her creditors with respect to whom it shall have been so adjudged, at any time before such period shall have arrived, in the same manner as he would have been subject and liable thereto if this act had not passed." *Turnor v. Darnell*, 5 Mee. & W. 28, shows that the effect of this section is, that an insolvent may be arrested by a *capias* under the 2 & 3 Will. 4, c. 39. The indorsement on that writ authorizes the sheriff to take bail, and if the prisoner may give bail, the creditor must be also entitled to receive the amount of the debt.

[PARKE, B. What is the use of allowing the arrest, except to enable the creditor to get the debt?]

Hawkins, in support of the rule. The object of the Insolvent Act is to secure an equal division of the insolvent's estate among his creditors, and the warrant of attorney which the insolvent gives is intended to secure an equal division of his future property; but permitting any creditor to obtain payment by means of arresting the insolvent would defeat this object of the statute. The power to arrest is for the punishment of the debtor, not for the pecuniary benefit of the creditor.

[PARKE, B. Arrangements with the detaining creditor are not prohibited. What is there to prevent the insolvent borrowing the money of a friend, and paying his debt with it?]

The money would become the property of the assignee, in whom the insolvent's future property is vested.

[PARKE, B. If that were so, the plaintiff could not be entitled to recover it back.]

¹ That section enacts, "That after every person shall have become entitled to the benefit of this act by any such adjudication as aforesaid, no writ of *fieri facias* or *elegi* shall issue on any judgment obtained against such prisoner, for any debt or sum of money with respect to which such person shall have so become entitled, nor in any action upon any new contract, or security for payment thereof, except upon the judgment entered up against such prisoner according to this act."

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The receipt of the money was, in substance, by means of a security within the prohibition of the 91st section. A judge's order is equivalent to a warrant of attorney, and a warrant of attorney has in many instances been set aside. *Ashley v. Killick, Ex parte Hart*, 2 Dowl. & L. P. C. 778; *Humphries v. Smith*, 22 Law J. Rep. (N. S.) Q. B. 121; s. c. 16 Eng. Rep. 228. In *Ex parte Hart* money paid was ordered to be returned.

[ALDERSON, B. It was there paid under the belief that the warrant of attorney would be enforced; in this case the money was not paid under the judge's order.]

The arrest was for the whole amount of the debt, including the amount then paid.

PARKE, B. I am of opinion that this rule ought to be discharged. The arrest was lawful, and the insolvent being in lawful custody does not give a new security, but pays a part of his debt to the creditor who has arrested him. I am clearly of opinion the payment is valid. Under the writ of *capias* the plaintiff was undoubtedly entitled to give bail, and if instead he chooses to pay the amount, the creditor may keep it. It is said that the object of the legislature was to punish the insolvent; if so, that intention has not been expressed. It was a voluntary payment to get rid of legal process. The case is different where a fresh security is given, for that is made void under the 91st section. If upon such new security he were to pay the money, I do not say that it could not be recovered back, but I cannot help feeling some doubt whether my brother Wigham was right in his decision in *Ex parte Hart*, so far as it relates to the repayment of the money received.

ALDERSON, B. If *Ex parte Hart* had been limited to preventing the warrant of attorney being enforced I should have agreed with it, but that was not so. I should be inclined to say, that if a promissory note were given, and part of it paid, it would not be recoverable back.

PLATT, B. When the legislature transferred to the creditor the power of detaining his debtor in custody, it was intended that he should have the usual fruits of the judgment if he could get them, and payment is one of those fruits. I am not at all sure that the legislature did not intend that creditors who had been treated should have the means of obtaining payment.

MARTIN, B. Both in law and in common sense there is a great difference between payment and giving security. With a few exceptions, if a man pays money under an illegal contract he cannot recover it back. Persons must either repudiate such contracts altogether or abide by them, and money once paid ought not to be recovered back. As to *Ex parte Hart* it may be remarked, that the courts exercise a sort of jurisdiction over warrants of attorney, and on that ground the decision may perhaps be supported. But I cannot agree with my brother Parke that it is not clear that it was legal.

Rule discharged.

Regina v. Edwards.

REGINA v. EDWARDS and another.¹

July 6, 1853.

Extent — Prerogative — Fraction of a Day — Course of Exchequer.

A fraction of a day cannot be taken into account, where the conflict is between the right of the crown and the right of the subject.

Therefore, where an adjudication of bankruptcy and the appointment of an official assignee took place in the morning, and at a subsequent period of the day an extent issued against the bankrupt : —

Held, per Pollock, C. B., Parke, B., and Platt, B., that the bankrupt's property might be taken under the extent. Per Martin, B.—The priority of events happening on the same day, may be inquired into between the crown and the subject, just as between subject and subject.

A WRIT of immediate extent, tested the 9th of September, was issued at the suit of the crown against one Benjamin Salter, for 1,721*l.* 1*s.* 7½*d.*, due to the crown for malt duty. Upon the 23d of September an inquisition was taken, and the jury found that Salter was, on the day of issuing the extent, possessed of certain goods, chattels, and debts. Upon the same day, the defendants, as assignees of Salter, claimed the goods, &c., with certain exceptions, and upon the 6th of November they pleaded to the inquisition. The plea, in substance, stated that Salter was adjudicated a bankrupt, and the defendant, E. Edwards, duly appointed official assignee of his estate on the 9th of September, and before the issuing of the writ of extent, and before the granting of any fiat for the issuing of the same, by virtue of which the goods and chattels claimed became absolutely vested in the said E. Edwards as such assignee. The plea concluded with a special traverse that Salter was, on the day of the issuing of the writ of extent, or at the time of the inquisition, possessed of the said goods and chattels. Verification and prayer of judgment of *amoveas manus*.

Replication, that the said adjudication of bankruptcy was not made on any day before the day of the issuing of the said writ of extent *modo et formâ*, concluding to the country. Special demurrer and joinder.

The case was argued² in Easter term, (May 6) and Trinity term, (May 27) by —

Bramwell (with him *Kingdon*,) in support of the demurrer, and

Watson (with him *J. Wilde*,) for the crown. It was admitted that the replication was bad; and the simple question to be decided was, whether the adjudication and appointment of the official assignee,

¹ 23 Law J. Rep. (N. S.) Exch. 42.

² Before POLLOCK, C. B., PARKE, B., PLATT, B., and MARTIN, B.

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Having taken place at an earlier period of the day on which the writ of extent issued, the doctrine that there is no portion of a day, as against the crown, was to prevail. The arguments are sufficiently stated in the judgments

In support of the demurrer the following authorities were cited:— Stat. 12 & 13 Vict. c. 106, s. 141; *Swain v. Morland*, 1 B. & B. 370; *The Attorney General v. Capell*, 2 Shower, 480; *Giles v. Grover*, 9 Bing. 156, 162, 163, 166; *Brassey v. Dawson*, 2 Str. 982; *Rex v. Crump and Hanbury*, Parker, 126; *Rex v. Earl*, Bunb. 33; *Whitaker v. Wisbey*, 12 Com. B. Rep. 44, s. c. 9 Eng. Rep. 457; Plowd. 264; Co. Litt. 30 *b*, 150 *a*.; 2 Ventris, 268; Broom's Legal Maxims, 105.

[POLLOCK, C. B. referred to *Rogers v. Mackenzie*, 4 Ves. 752, and *Rex v. Cotton*, 2 Ves. sen. 288.

MARTIN, B., referred to *Roe v. Hersey*, 3 Wills. 374.]

On behalf of the crown, the following authorities were cited:— Montague's Bankrupt Law, 664 (edition of 1805); Eden's Bankrupt Law, 272; 2 Tidd's Practice, 1054; West on Extents, 116; App. 96; Manning's Exch. Prac. 47, 48, App. 251; *Russell v. Ledsam*, 14 Mee. & W. 574; *Rex v. Giles*, 8 Price, 293; *Brassey v. Dawson*, 2 Str. 978; *Rex v. Mann*, Ibid. 749; *Rex v. Cotton*, 2 Ves. sen. 288; s. c. Parker, 112, 127; Tremayne's Pleas of the Crown, 637; *Giles v. Grover*, 9 Bing. 279; *Rex v. Earl*, Bunb. 33.

As to the course of the Exchequer being the law, the following cases were cited:— *Rex v. Woolf*, 2 B. & Ald. 609; *Dean v. Regina*, 15 Mee. & W. 475; *The Attorney-General v. Farr*, 4 Price, 122, 130; *Regina v. Ryle*, 9 Mee. & W. 227; *Wingfield v. Jefferys*, 1 Lord Raym. 284.

Bramwell, in reply, referred to *Swain v. Morland*, as reported in Gow, N. P. 39, and cited in Manning's Exch. Prac. 44.

Watson, in the exercise of the prerogative right, replied generally, and referred to *Cawthorne v. Campbell*, 1 Anst. 208, 210; and *Rogers v. Mackenzie*.

Cur. adv. vult.

The judges, differing in opinion, now delivered their judgments as follows:—

MARTIN, B. After stating the substance of the pleadings, his lordship proceeded— The question which arises upon the plea is, whether the appointment of the official assignee at an earlier part of the same day on which a fiat is granted for and an extent issued at the suit of the crown against the bankrupt for a crown debt, prevents the property being taken under the extent? By virtue of the 141st section of the Bankrupt Law Consolidation Act, the 12 & 13 Vict. c. 106, such appointment *ipso facto* operates to transfer the personal estate of the bankrupt to the assignee. The enactment is,

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"that when a person shall have been adjudged a bankrupt all his personal estate shall become absolutely vested in his assignee by virtue of his appointment." But it was contended by the learned counsel for the crown that, as against the crown, the day must be deemed one indivisible instant, and that the three events, namely, the appointment of the assignee, the granting of the fiat for the extent, and the issuing of the extent, must be considered as all having taken place at the same moment of time; and if this be so the plea is bad, for there is no doubt that "in things of an instant the crown shall be preferred," (Plowd. 264; Co. Litt. 306, *b*,) and that whenever the rights of the crown and of the subject are concerned, the crown has the priority. On the other hand, it was contended by the learned counsel for the defendants that the truth was the truth, and may always be ascertained, whether it be in the case of the crown or in a case between subject and subject; and that if in reality and fact the property had passed out of the crown debtor before any step was taken on behalf of the crown to enforce payment of this debt, there was no concurrence between the crown and the subject, and there was no property in the debtor upon which the extent could operate.

The general law relative to the fraction of a day, as it is termed, is perfectly clear. For a great many purposes the day is taken as an entire thing, but there is no doubt that, as between subject and subject, when conflicting rights of the character of that in the present case arise, the law takes notice of the fraction of a day. This is distinctly laid down by Parke B., in the judgment of the Court of Exchequer in *Russell v. Ledsam*. So, also, in *Combe v. Pitt*, 3 Bur. 1424, Lord Mansfield treats the entirety of a day as a legal fiction, and says that the law allows of a fraction of a day whenever it is necessary to distinguish it: and adds, "I do not see why an hour may not be [treated] so too," for it is not like a mathematical point, which cannot be divided; and in *Roe v. Hersey* the same is stated to be the law. The court there said, "The rule that there is no fraction of a day is a legal fiction, and '*Fictio juris neminem ledere debet.*'" The question then comes to this, whether that which is the undoubted law as between subject and subject is also law as between the crown and the subject? If the case were to be decided merely upon the principles of reason and good sense I apprehend no doubt could exist on the subject. A transaction which takes place on the morning of a day may be as complete and distinct and separate from a transaction which takes place on the evening of the same day as from one which takes place on the evening of the previous day. And, as I said in the case before mentioned, the position that a day is to be taken as an instant of time is a pure fiction, and in the present case, as it seems to me, a peculiarly absurd one, for one of the events which by it are concluded to have taken place at the same instant with the others, must of necessity have preceded one of them, for the fiat for the extent must, of inevitable necessity, have preceded the issuing of the extent. But no doubt the case is to be decided by authority if it exists; and in the case of conflicting authorities our decision should, as it seems to me, be governed by the consideration,

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which of them is the more conformable to the law in analogous cases? which more consistent with justice and good sense? and unless it be clearly seen that some manifest error or mistake has occurred I think the later authority ought to prevail. A very great number of cases and extracts from text-writers were cited on both sides, but in reality the question will be found to depend upon whether preference is to be given to the law as stated in *Rex v. Earl* and *Rex v. Cotton*, which statements of the law are alleged by the learned counsel for the crown to be conclusive in his favor, or to the law as stated in a case of *Serain v. Morland*, which is alleged by the learned counsel for the defendants to be equally conclusive the other way. What is to be found in *Bunbury* is this: "A person named Earl had become bankrupt, and the assignment to his assignee was executed upon the 31st of January, 1718. An extent issued against him, tested the same day, by virtue of which the sheriff took the goods out of the hands of the assignees, which they had seized.

The report then proceeds thus: "Nota, the messenger under the commission, took possession of the goods before the extent, but it was given up and admitted that the extent, bearing equal date with the commission, should undoubtedly have the precedence." The question in the case in *Parker* was, whether the extent prevailed against a distress which was tested before the sale: and it was held that it did, upon the principle that the actual transfer of the property out of the crown debtor is essential to defeat the extent. Chief Baron Parker reports himself to have said this in delivering his own judgment: "The rule (namely, that the transfer of the property is the test) holds equally in the case of a seizure made by virtue of a warrant of commission of bankrupt, and yet the warrant is no execution. This was held in the case of *Rex v. Crump and Hanbury*, in the reign of Charles the Second. I have also," he proceeds to say, "a short manuscript note of it, which reports it thus: one indebted to the crown became bankrupt, and a commission of bankruptcy was sued out against him, and an assignment was made of his estate, and an extent issued for the crown tested the day of the date of assignment, and the extent was preferred and this adjudged by my great predecessor Sir Matthew Hale." He then states that the case of *Rex v. Crump and Hanbury* is mentioned in *The Attorney-General v. Cassell*. Upon reference to *Shower* the facts appear to have been these. One Lewis was indebted to the king, and on the 21st of March an extent issued against him. Lewis was bankrupt at the time, and on the 12th of March his goods had been seized by warrant from the commissioners, and on the 21st, the day of the teste of the extent, the commissioners assigned to the creditors, which was then the practice in bankruptcy. The court held, that the crown was entitled to the goods, "for that although the goods were actually *in custodia legis*, yet, because the extent came before the property was vested by the assignment, it was held a good extent." It was contended, and with perfect truth, that this case was, in reality, no authority against the defendants, but rather in their favor, for that, upon the facts, it appeared that the extent not only

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issued, and was tested, but actually came, that is, I presume, was placed in the hands of the sheriff before assignment, and whilst the goods were in the hands of the messenger, or, in other words, "*in custodia legis*," in which case the crown would undoubtedly be entitled, because the property was not then transferred out of the bankrupt. Goods are not *in custodia legis* when in the hands of the assignee of a bankrupt; on the contrary, they are the property of the assignee for the benefit of the bankrupt's creditors. For the purpose of ascertaining with certainty what was the precise plea in this case, we caused the original roll to be produced, and we found it to be in accordance with the statement in Shower. The plea did not show that the assignment had been executed before the teste of the extent, which, according to the ordinary principles of pleading, the defendant was bound in his plea to aver in order to show a better title to goods than the crown. As to the case from *Bunbury* it is said that what is there stated was at best an admission by an unnamed counsel; and besides that, the cases in *Bunbury* were mere loose notes, never meant to be published, the authority for which was a statement by Lord Mansfield in *Tinkler v. Poole*, 5 Burr. 2658. There can be no doubt, however, that these cases have been considered authorities for the position contended for on behalf of the crown; for (besides many other references in the books) Mr. Baron Wood is reported to have said in the case of *Rex v. Giles*, that "the extent takes precedence if it be tested before the assignment, and even on the day of the date of the assignment, because as they both happen on the same day the crown by its general prerogative shall have the preference, as was decided in the case of *Rex v. Crump and Hanbury*." It will be of no avail referring to the other authorities cited by the learned counsel for the crown, for none of them are direct upon the question; and what is said rests upon the authority of the cases before referred to. As to the words of the text writers, those published before the decision of the Court of Common Pleas in *Swain v. Morland*, namely, West and Manning, state the law as mentioned in *Bunbury* and *Parker*, citing them as the then authorities; and those published after state it as doubtful; and Lord Henley, in his work on Bankruptcy, p. 287, 3d edit., expresses his opinion that the law as laid down by the Court of Common Pleas is much the more consistent with justice and good sense. The case of *Swain v. Morland* was, as before mentioned, relied on by the learned counsel for the defendants as conclusive in his favor. In this case the Court of Common Pleas, after argument in which all the cases upon the subject were brought before them, including the cases in *Bunbury* and *Parker*, delivered a written judgment after time taken to consider, that unless the fiat for the extent issued at a time of the day before the property of the crown debtor was changed the extent was of no effect; that the law would take notice of the fraction of a day in the case of the crown as well as between subjects; and they distinctly stated that as there was no fact from which it appeared that the fiat for the extent was anterior to the sale (by which the transfer of the property was effected in that case,) they could not presume it, or suffer a fiction to prevail against the justice of the case.

Now, this is an express authority upon the point by a court of co-ordinate jurisdiction with our own; and, as I have already said, it is in my opinion our duty, and in accordance with the ordinary practice of the courts at Westminster Hall, to decide in conformity with it, unless there appears to be some manifest error or mistake. I certainly do not think that any such error appears, for the judgment is in conformity with the known and admitted law in analogous cases, and, as it seems to me, more consistent with justice and good sense than the statement of the law to the contrary in *Bunbury* and *Parker*, the latter of which is proved by the record on the roll to have been nothing beyond an extra-judicial dictum, and the former only professes to be an admission of an unnamed counsel. I also think that in the present administration of the law, it is most desirable to get rid, so far as is possible, of fictions and unrealities of every kind. But even were I inclined to the contrary opinion, I think that after the decision in the Common Pleas, the crown, and not the defendants, ought to be put to the writ of error to reverse the judgment if it be erroneous. It was said that by the course of the Exchequer the crown was entitled to judgment. The course of the Exchequer "is to be shown by the known practice of the Exchequer, or by its records;" *Plowden*, 320; *The Attorney-General v. Briant*, 15 Mee. & W. 185; and it is sufficient to say on this point, that no record was alleged to exist to support the principle contended for by the learned counsel for the crown, nor was any instance shown of any such practice, either in the argument in the Court of Common Pleas in *Swain v. Morland* or in the argument in the present case. In my opinion the defendants are entitled to the judgment of the court.

PLATT, B. I must say that upon this question I never entertained the slightest doubt. I do not concur with my brother Martin, who appears so desirous of getting rid of all fiction. It appears to me that it is the duty of the judges of the land to expound and declare the law as they find it. We do not sit here to legislate, but to administer the law according to the precedents; and therefore it is that I appeal to the precedents which are to be found upon the subject. Certainly all those who have had any experience of the practice of this court for the last forty years must well know the general course of the Exchequer in adjudicating upon cases of this kind. When the question arises between subject and subject the court will make a division of a day; but when the question arises between the crown and a subject, I never heard a doubt that in a court of revenue there is no division, and therefore, whatever takes place upon the same day must be held to have taken place on the same instant. That being so, the cases of *Rex v. Earl* and *Rex v. Cotton* have laid down the true doctrine with reference to the prerogative of the crown. It seems to me, indeed, according to the course of this court, to be put beyond argument. We are not to abrogate that which has been the law of this court, if I may say so, according to all persons who have been conversant with its practice. The notes in *Bunbury* are not to be got rid of as it is attempted, because, although Lord Mansfield, in *Tink-*

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ler v. Poole, cast some imputation on those notes, the very learned person who edited those notes gives a very different account of them, and it may be doubted whether it was not a very hasty expression on the part of Lord Mansfield before he was fully aware of their value. Now, Sergeant Wilson, who edited Bunbury's Reports, speaks thus about them: "The learned author attended Westminster Hall above forty years, chiefly at the Exchequer bar, but for the last thirty years thereof in that court only. He retired in the year 1743, and when he took leave of the court had been many years postman there. His long experience in the several branches of business in the Exchequer induced gentleman of the profession to desire his notes, which in his lifetime were all, or the greater part of them, transcribed in many hands and frequently cited in Westminster Hall. From some apprehension that these notes might get into the press improperly and come out imperfectly, and, indeed, by the desire of some gentlemen eminent in the profession, the editor was persuaded to give the public a true copy of such cases only as the author took in court with his own hand, and are settled and corrected by himself from his own notes." These notes having been thus collected and published by so learned a person as Mr. Sergeant Wilson, it seems to me to be rather a rash proceeding to give such a character to them as Lord Mansfield is reported to have done. "All the marginal notes," the editor says, "in this book are the author's own, except one, in page 302, of *Walker v. Jackson*, coram Lord Chancellor Hardwicke, July 22, 1743." I thought it right, as that expression of Lord Mansfield has been alluded to, at the same time to bring before the court the character which is given to these very notes by the gentleman who had the responsibility of publishing them, he himself bearing as high a character as any gentleman at the bar. I think, therefore, that the judgment in this case ought to be for the crown.

PARKE, B. The question raised by the pleadings in this case is, whether, where an adjudication in bankruptcy and the appointment of an official assignee, (which vests the property in him,) took place before the fiat, and the actual issuing of an extent, the title of the assignee or of the crown should prevail. Is the fraction of a day to be taken into account; the true order of facts to be considered as against the crown? I am of opinion that it should not, and that the title of the crown must prevail. This depends wholly upon precedent and authority. In cases between subject and subject there is no doubt that the priority of events which have occurred on the same day may be inquired into; but in the case of the crown a different rule has always prevailed, established, no doubt, in order to give the crown, for the advantage of the public at large, greater power of enforcing the payment of debts due to it; and in the case of bankruptcy, it is a matter of great importance to the revenue. In the case of *Rex v. Earl* it is stated as undoubted law. A commission of bankruptcy and an assignment bore equal dates with an extent. The messenger took possession of the goods, but possession was given up, and it was admitted that the extent should undoubtedly

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have the precedence. This was in the year 1718, and it was stated that *undoubtedly* the extent should have the precedence. The authority of Bunbury is disparaged by Lord Mansfield, who says that Bunbury never meant that the cases should be published, and that they were very loose notes. But Mr. Sergeant Wilson, the able editor of Bunbury's Reports, states, that those notes, which were taken by his own hand, were given to the public by Bunbury, who had been for many years an officer of this court, only after they had been settled and corrected from his own notes. In 1751, Parker, C. B., considered this point to have been settled. He says, "This was so held in the case of *Rex v. Crump and Hanbury*, which is entered, Easter, 20 Charles 2, roll 80, in the king's remembrancer's office, but judgment given in Easter, 22 Charles 2, where the extent and the assignment were tested on the same day, and the extent was held to have the precedence. The record is in Tremayne's Pleas of the Crown, 637. On referring to the record it does not appear that the defendant stated that the assignment was actually made before the teste of the extent, though on the same day, and it is possible that the decision may have turned on that ground, as the defendant must, in the pleadings, make a complete title against the crown; but Lord Chief Baron Parker considers it as a decision of Sir Matthew Hale on the general point that where an assignment and an extent are dated the same day, the title of the crown must prevail. The doctrine thus stated was laid down by Baron Wood, in the case of *Rex v. Giles*, where he says, "If the teste and the assignment happen on the same day, the crown, by its general prerogative, shall have the preference;" and he also considers the case of *Rex v. Crump and Hanbury* as deciding that point. West, in his book on Extent, p. 115, and my brother Manning, in his Exchequer Practice, p. 47, both treated this as clear law. In *Russell v. Ledsam* I purposely excepted the case of the crown, when I stated that "the law never takes notice of the fraction of a day, except where there are conflicting rights between subject and subject." In the case of *Swain v. Morland* goods had been seized under a *fi. fa.* and part of them sold on Saturday and the remainder on Monday; an extent tested on the Monday was put into the sheriff's hand at six o'clock, after the goods had been delivered to their purchasers; it was held that the execution was executed, and that the party who issued the *fi. fa.* might recover of the sheriff in an action for money had and received, the money levied under the sale. My brother Martin said it was a written judgment. Certainly it was delivered after time taken for consideration, but I should have doubted its being read, because there are so many inaccuracies in it, and it rather indicates that the chief justice, if he is correctly reported, imagined that the delivery to the sheriff was important; but certainly that has nothing to do with the case. No doubt, however, it was a case decided after time taken to consider it, but in that case the doctrine that the fraction of a day could not be inquired into was not fully argued and considered by the court. Had it been so, I should probably, though with great reluctance, have acquiesced in that decision, until it had been reversed in a court of error, though upon a

In re Hardy v. Walker; Ex parte M'Fee.

branch of the laws which is peculiarly the subject of the jurisdiction of this court. This point was treated as a secondary point by the learned counsel who argued the case. The first ground he showed was clearly untenable, and not likely to meet with great attention. That was answered by the learned counsel for the plaintiffs by a very inaccurate representation of the authority in *Bunbury*, to which I have referred. The attention of the court was certainly not given to this point in the manner its importance deserved, and no one was there to protect the interests of the crown. The case appears to be very unsatisfactory, and decidedly ought not to be considered as overruling the established course of the Exchequer, which is a part of the law of the land.

I may add, that the lord chief baron entirely concurs in the opinion which I have expressed as to the old practice of the Court of Exchequer.

Judgment for the crown.

*In re HARDY v. WALKER. Ex parte M'FEE.*¹

November 4, 1853.

County Court — Interpleader — Erroneous Decision as to Sufficiency of Claim — Prohibition.

Where a county court judge decides that the particulars of a claim in an interpleader summons are not sufficient according to the rules made under the County Courts Act, and refuses on that account to hear the claimant, a prohibition lies to stay the further proceedings under the execution, if the particulars ought to have been held sufficient.

A claimant, in the particulars delivered, in pursuance of the 145th rule, was described as of 24 Elizabeth Street, Islington, whereas his true address was 20 Elizabeth Terrace, Islington:—

Held, that the address was sufficiently set forth; and that the county court judge was not justified in dismissing the summons.

AN execution having issued out of the County Court of Middlesex, held at Brompton, in a plaint of *Hardy v. Walker*, and goods seized under it, one J. M'Fee claimed to be the owner, and an interpleader summons was duly issued. The claimant then delivered at the office of the clerk of the court the following notice:

“Take notice, that a particular of the goods and chattels, the subject of this interpleader summons, and alleged to be the property of James M'Fee, the claimant herein, is set forth in the schedule hereunder written; and that the said James M'Fee claims the said goods and chattels, and that the grounds of his claim are: that, on or about the 1st day of February, 1852, he purchased a portion of the said

¹ 23 Law J. Rep. (N. S.) Exch. 57; 9 Exchequer Rep. 261.

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goods under a distress levied thereon for 22l. 10s. rent due to one Mr. Field; and that the person who distrained thereon and sold the same to claimant was Henry Perry, appraiser, 10 Little St. Andrew's street, Upper St. Martin's Lane, and for the consideration mentioned and set forth in a certain assignment, bearing date the 27th day of December, 1852, made between William Snowball Walker of the first part, and the claimant of the other part; and the said William Snowball Walker did assign unto the said claimant the remaining portion of the said goods and chattels. Dated this 9th day of June, 1853.

“Yours, &c.

(Signed)

C. VALLANCY LEWIS,

“Attorney for JAMES M'FEE, of No. 20 Elizabeth street, Islington, broker and dealer in furniture.”

The schedule of the goods was annexed. At the hearing of the interpleader summons, it appeared that the claimant lived at 20 Elizabeth Terrace, Islington, when it was objected that the 145th rule¹ had not been complied with; and the learned judge held that the objection was fatal, and dismissed the summons. Application was then made, at chambers, to Parke, B., and his lordship granted a prohibition to prohibit the selling of or proceeding with the execution on the goods or chattels so seized and taken in execution in the plaint of *Hardy v. Walker*, and the doing of any thing that might lead to the damage of the said James M'Fee.

Udall, now moved for a rule *nisi* to set aside the prohibition. The decision of the county court judge was correct, for the 145th rule distinctly requires the name, description, and address of the claimant to be fully set forth. The rules were made under the 12 & 13 Vict. c. 101, s. 12, and are of the same force and effect as if the same had been enacted by authority of parliament. But, even, if the description ought to have been held sufficient, it would only be a wrong decision on a point of practice, and prohibition will not lie in such a case. The judge was rightly seised of the question, and the sufficiency of an address is necessarily a matter of fact to be decided according to the particular circumstances of each case. This court refused to interfere where execution had issued against a defendant who had never been served, or in any way had notice of the plaint, because service was a question of practice for the judge of the County Court to decide. *Robinson v. Lenaghan*, 2 Exch. Rep. 333. He cited also *Thompson v. Ingham*, 14 Q. B. Rep. 710, and *Regina*

¹ By that rule, the claimant is required, “five clear days before the day on which the summonses are returnable, to deliver to the said officer, or leave at the office of the clerk of the court, a particular of any goods or chattels alleged to be the property of the claimant, and the grounds of his claim; or in case of a claim for rent, of the amount thereof, and for what period, and in respect of what premises the same is claimed to be due; and the name and description and address of the claimant, shall be fully set forth in such particulars.”

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v. Richards, 20 Law J. Rep. (N. S.) Q. B. 351; s. c. 3 Eng. Rep. 410. To allow this prohibition will be to establish the right of reviewing the decision of the county court judge as to all the other particulars required by the rule, which will be highly inconvenient. The form of the prohibition is also wrong, for it purports to prohibit the carrying out the judgment of the court in a plaint to which the claimant is no party.

[PARKE, B. When the interpleader summons has been heard, the cause may go on.]

POLLOCK, C. B. I am of opinion that there should be no rule. The whole matter lies in a small compass. There is a suit between two persons in the County Court, and there is judgment against the defendant. Then there is execution against the defendant's goods, and the goods of another person are taken. He then makes a claim on the goods, and gives an incorrect but sufficient address, and his claim ought to have been attended to. The judge on a purely technical ground refuses to hear it; and my brother Parke then issues a prohibition, and says you shall not go on with the execution until the claim to the goods is properly determined. I think that he was quite right.

ALDERSON, B. I am of the same opinion. It would be a mere mockery of justice if such objections were to be listened to. The learned judge has made a mistake, and he ought to hear the claim. The name and address were given so that they could mislead nobody. The county courts ought to be free from any technicality such as this.

PLATT, B. The county court judge is properly prohibited from proceeding in the plaint, because his doing so would only be the consequence of his having improperly declined jurisdiction. The interpleader summons ought to be properly disposed of before he proceeds any further.

PARKE, B. The jurisdiction of the county court judge to go on with the plaint is taken away as soon as the claim is properly put forward. The rules do not by words or by implication make the county court judge conclusively judge of the fact whether the claim is in conformity with the rules or not. It is not a mere point of practice, but a question of jurisdiction, and the county court judge can neither give himself jurisdiction where he has it not, nor deprive himself of jurisdiction where he has it, by an erroneous decision on a matter of fact. *Thompson v. Ingham*. I was satisfied on looking at the affidavits that the address was sufficient. The object of giving an address is to ascertain who the claimant is, and unless the most minute technicality is to be required this was sufficient. It was, therefore, right to prohibit the judge from going on with the original plaint.

Rule refused.

Arnold v. Bainbrigge.

ARNOLD v. BAINBRIGGE.

November 5, 1853.

Pleading — Set-off — Nil Debet, Evidence under — Joint Debt.

Where to a plea of set-off the plaintiff replies that he is not indebted as in the plea alleged, he may under this replication avail himself of the objection that the debt is due not from himself alone, but from a third party jointly with him.

THIS was an action on an award, in which the plaintiff sought to recover 2,250*l*.

Plea — Set-off.

Replication — That “the plaintiff was not nor is indebted as in the plea alleged.”

At the trial, before Wightman, J., at the last Liverpool Summer Assizes, it appeared that the debt which formed the subject of the set-off was not due from the plaintiff alone, but from him and other persons jointly. For the plaintiff it was objected that a joint debt due from the plaintiff and others could not be set off against a separate debt due to the plaintiff alone, and that the objection was open to the plaintiff under the replication in question. The judge was of this opinion, and the jury accordingly found a verdict for the plaintiff for the amount of the claim.

Knowles now moved for a new trial, on the ground of misdirection. The plaintiff is not at liberty under this form of declaration to object that the subject-matter of the set-off is a joint debt. A plea of set-off resembles a counter declaration; if the defendant had sued the plaintiff for the debt attempted to be set off, the plaintiff would have been precluded from objecting under a plea similar to this replication, that the debt was a joint one. *Richards v. Heather*, 1 B. & Ald. 29.

Per Curiam. The replication must be held to have that meaning, which will make the plea good. The meaning of the plea is, that the plaintiff alone is indebted to the defendant, for a debt cannot be made the subject of set-off unless it be mutual and due in the same right. The replication alleges that the plaintiff is not so indebted. There is no ground for a rule.

Rule refused.

Hills v. Laming.

HILLS v. LAMING and Others.

November 16, 1853.

Patent — Validity and Novelty — Estoppel by Deed.

A declaration in covenant stated that letters-patent had been granted to the defendant for improvements in purifying gas, and that other letters-patent had been granted to the plaintiff for an improved mode of manufacturing gas, and that certain parts of the plaintiff's invention intended to be secured, had been claimed in the specification; that disputes had arisen between the parties as to their rights under the letters-patent to the use of oxides of iron, for the purpose of purifying gas; that to put an end to such disputes, the parties covenanted with each other for a mutual right of using the patents on the terms of giving notice of the beginning to use the same. Breach, want of notice. Plea, that the plaintiff's patent was not a good and valid patent in this, that it was not new, and the plaintiff was not the true and first inventor: —

Held, that the intention of the deed was to prevent disputes between the parties, and that the defendants were estopped by the deed from denying the validity of the patent, its novelty, and that the plaintiff was the true and first inventor.

COVENANT. The declaration stated that by indenture, dated the 24th of July, 1851, made between the plaintiff and the defendant, after reciting that letters-patent, under the great seal, dated, &c., had been granted to the defendant, for improvements in purifying gas, and that other letters-patent had been granted to and were vested in the plaintiff, for an improved mode of manufacturing gas, and that certain parts of the invention intended to be thereby secured were claimed in the specification thereof, and that disputes had arisen between the said parties thereto as to their rights, under the said letters-patent, to the use of oxides of iron, for the purpose of purifying gas; that to put an end to the said disputes, the parties covenanted with each other that they should have liberty to use the two patent inventions so granted to the plaintiff, and *vice versa*; and within fourteen days after either party should begin to use the inventions of the other, he should give fourteen days' notice of his having done so. The declaration stated other provisions in the deed, which are not material, and alleged as a breach that the defendants began to use the plaintiff's invention, and did not give notice to the plaintiff of their having so done.

The defendants pleaded, setting out the deed *in extenso*, that the plaintiff's patents were not good and valid patents, in this, that they were not new as to the public use and exercise thereof, and that the plaintiff was not the true and first inventor of the said alleged inventions.

Demurrer on the ground, first, that the defendants are estopped by the recitals of the articles of agreement from setting up that plea, since it denies the validity of the patent, which is admitted in their recitals; secondly, that the defendants are estopped by the words con-

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tained in the body of those articles, since thereby it was to be assumed that the plaintiff was entitled to the patents, and the patents are therein alleged to be the inventions of the parties, and the parties appear therein under the name inventors; thirdly, that the "differences and disputes" mentioned in those articles were presumably not as to the validity of the plaintiff's patents, and that the contrary therein appears.

Hindmarch (Sir F. Thesiger with him) for the plaintiff, in support of the demurrer. The defendants, having executed the deed, are estopped thereby from denying that the plaintiff's patents are good, and that he is the true inventor thereof.

[PARKE, B. This case resembles *Bowman v. Taylor*, 2 Ad. & E. 278. The patents must be taken to be valid.]

Cutler v. Bower, 11 Q. B. Rep. 973, is also to the same effect. — (He was then stopped by the court.)

Watson, contra. The defendants are not estopped from denying the validity and the novelty of the plaintiff's patents.

[PARKE, B. Both parties agree impliedly not to dispute the validity of each other's patents.]

There is no recital in this deed that the plaintiff's patents are valid, and that circumstance distinguishes the case from those that have been cited on the other side.

[PARKE, B., referred to *Hayne v. Maltby*, 3 Term Rep. 438.

POLLOCK, C.B. The judgment of Buller, J., in that case, shows that it is very different from the present.]

Per Curiam.¹ The plaintiff is entitled to judgment. The defendants are estopped from disputing the validity of the plaintiff's patent by the agreement, which is a bargain made between them for the purpose of preventing disputes.

Judgment for the plaintiff.

HALL v. GREEN.²

November 24, 1853.

*Penalties under 25 Geo. 2, c. 36 — Public Music, &c. — Misdirection
— Verdict against Evidence.*

The defendant kept a room which was used as a supper room and place of general refreshment, there being at the end of it a raised platform, on which stood a piano, and where songs were constantly sung. Programmes of the performance were laid about in different parts

¹ POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

² 23 Law J. Rep. (N. S.) M. C. 15.

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of the room. The company was respectable, and no money was paid for admission, nor any extra charge made for the articles consumed there. An action having been brought for a penalty under the 25 Geo. 2, c. 36, relating to public dancing, music, &c., the judge directed the jury to say whether the room was used for the purpose of supplying refreshments in the manner of an hotel, the music and singing being incidental merely, or whether it was used principally for musical performances; and ultimately he directed them to consider whether the room was used for both purposes, in which latter case the plaintiff would be entitled to the verdict. The jury found that the room was used for the purposes of an hotel, and found a verdict for the defendant:—

Held, that although the verdict might be against the evidence, there was no misdirection.

Held, also, (*dissentiente* Martin, B.,) that it would have been a misdirection in the judge to state that the question was, whether the keeping of the room as an hotel was the principal or secondary object.

DEBT for penalties under the statute of 25 Geo. 2, c. 36, for keeping a house for the public performance of music without a license.¹

Plea — never indebted.

At the trial, before Platt, B., at the Westminster sittings in this term, the following facts appeared:— The defendant kept a room on the basement floor of Evans's Hotel, Covent Garden, capable of containing from 200 to 300 persons, and which was used as a supper-room and place of general refreshment. At one end of the room a piano was placed on a raised platform, from which music was performed and songs constantly sung, sometimes by persons in character and at other times not. Printed programmes containing the songs to be sung were laid about in different parts of the room. The company was respectable; and no money was paid for admission, nor was any extra charge made for the liquors and other refreshments consumed in the room. *Gregory v. Tuffs*, 6 Car. & P. 271, was cited. These being the facts of the case, the learned judge directed the jury to say what was the purpose for which the room was used, whether it was used for the purpose of supplying refreshments in the manner of an ordinary hotel, the music and singing being incidental merely, or whether it was used principally for the purposes of musical performances; and at the close of his summing up, he directed them to consider whether the room was used for both purposes, intimating that in the latter case the plaintiff would be entitled to the verdict. The jury found that the room was used for the purposes of an hotel, and returned a verdict for the defendant.

Montagu Chambers now moved for a new trial, on the ground of misdirection, and also of the verdict being against the evidence. The learned judge misdirected the jury in leading them to suppose that the question was, whether the keeping the room as an hotel was the principal or the incidental purpose. This tended to mislead the jury. It is unimportant that the company frequenting the room is respectable. *Green v. Botheroyd*, 3 Ibid. 471, or that money is taken for admission.

¹ Section 2, enacts, That any house, room, garden, or other place, kept for public dancing, music, or other public entertainment of the like kind, in London or Westminster, or within twenty miles thereof, without a license for that purpose, shall be deemed a disorderly house or place, and the person keeping the same shall forfeit 100*l.* to such person as will sue for the same.

Archer v. Willingrice, 4 Esp. 186. Nor is it necessary that the room should be used solely for musical performances to make the party keeping it liable. *Bellis v. Beal*, 2 Ibid. 592, and *Gregory v. Tavernor*, 6 Car. & P. 280, show that a room kept for drinking, music, and dancing is within the 25 Geo. 2, c. 36.

[PARKE, B. I do not think it matters which purpose was principal and which accessory. The judge ultimately directed the jury rightly in desiring them to consider whether it was kept for both purposes. There was, therefore, no misdirection; and in a penal action no new trial will be granted on the ground of the verdict being against the evidence.]

That is the old law.

[PARKE, B. It is not the worse on that account.]

The jury were misled by the mode in which the case was, in the first instance, left to them, and they were not set right by a mere asking of questions by the learned judge at the end of the case.

PARKE, B. There will be no rule in this case. The fact of the verdict being against the evidence is no ground for a new trial in a penal action. That is the old law, and there is no ground for overruling it. No doubt it would have amounted to misdirection if the judge had merely desired the jury to consider which was the principal object of keeping the house and which was the accessory, for if the room had been kept both for the purposes of an hotel and also for music, and there had been no license, the defendant would have been liable. But at the end of the summing up and before the verdict was returned, the judge, for the purpose of avoiding all questions on the subject, asked the jury to consider whether the house was not kept for the double purpose. The jury found that it was not so kept, but for the purposes of entertainment only. The direction was therefore right, and although the verdict may have been against the weight of the evidence, there is no reason for granting a new trial on that ground in a penal action.

ALDERSON, B. I am of the same opinion. There is no misdirection in this case. The jury in answer to the judge found that the room was kept for the purposes of entertainment only. That in my opinion was a wrong verdict, but we cannot set it aside on that ground. If an improper verdict of not guilty is found in felonies and misdemeanors the courts do not set it aside, — holding it to be better that the guilty should escape than that the matter should be tried over again. And this is a salutary rule.

PLATT, B., concurred.

MARTIN, B. I differ from the rest of the court in thinking it would have been a misdirection in the judge to tell the jury to consider whether the keeping of the room as a hotel was a principal or secondary object. The verdict may be a wrong one, but in a penal action we cannot grant a new trial on this ground. [His lordship referred to the case of *Marks v. Benjamin*, 5 Mee. & W. 565.] *Rule refused.*

Glynne v. Roberts.

GLYNNE, BART. v. ROBERTS.

November 24, 1853.

County Court — Costs — Judgment by Default.

The exception in the 11th section of the County Courts Extension Act, 13 & 14 Vict. c. 61, as to costs in the case of judgment by default, applies to interlocutory as well as to final judgment by default.

THIS was a rule calling on the defendant to show cause why the master should not tax the plaintiff his costs, notwithstanding the sum recovered was under 20*l.*, pursuant to the 13 & 14 Vict. c. 61 s. 13. The defendant had suffered judgment by default; and on the execution of a writ of inquiry appeared before the sheriff and opposed the plaintiff's claim, when the jury returned a verdict for the plaintiff, damages one farthing.

Welsby showed cause. The plaintiff is not entitled to costs. The question turns on the 11th and 12th sections of the 13 and 14 Vict. c. 61. The 11th section enacts, that if, in any action of trespass, trover or case, the plaintiff shall recover a sum not exceeding 5*l.*, "the plaintiff shall have judgment to recover such sum only and no costs except in the cases hereinafter provided and except in the case of judgment by default." The 12th section enacts that if the plaintiff shall in any such action recover less than the sum thereinbefore "mentioned by verdict, and the Judge or other presiding officer before whom such verdict shall be obtained shall certify" that there was a sufficient reason for bringing such action, &c., then the plaintiff shall have the same judgment to recover his costs as if the act had not been passed. The plaintiff has not entitled himself to costs, for he does not fall within the exception in the 11th section as to judgment by default, as that section applies to a final and not an interlocutory judgment by default, like the present. Here the sheriff has not certified; and the question is, whether he is not such a "presiding officer" as is contemplated by the 12th section.

[PARKE, B. The words "presiding officer" apply to other persons than the sheriff.]

The words "judgment by default" mean final judgment by default.

[PARKE, B. I do not see clearly why the case of judgment by default should have been excepted by the statute, but the legislature has certainly excepted judgment by default in unmistakable terms. The case of judgment by default, therefore, remains the same as before the passing of the act, and the plaintiff is entitled to his costs.]

¹ 23 Law J. Rep. (N. S.) Exch. 64; 2 Common Law Rep. 426; 9 Exch. Rep. 253.

*Ashworth v. Mounsey.**Willes*, contra, was not called on.*Per Curiam*.¹ We think the rule must be absolute.*Rule absolute.*ASHWORTH and Another v. MOUNSEY.²

November 14, 1853.

Vendor and Purchaser — Conditions of Sale.

T. being possessed of a plot of land for a term of years, by indenture, dated the 24th of April, 1845, mortgaged the term to S., as a security for 300*l.*, with an absolute power of sale on default of payment. On the same day he executed a memorandum of agreement, by which he undertook to deposit with S. a lease of another plot of ground when it should be executed, the draft of which was already prepared, as a further and collateral security for the sum secured by the mortgage. A mill and certain buildings occupied therewith, stood partly on one plot of land and partly on the other. On the 18th of December, 1848, the lease was granted to T., and then deposited with S., in accordance with the memorandum of agreement. By indenture of the 27th of August, 1845, T. executed a second mortgage of the term mortgaged to S., as security to H. M. for 100*l.* On the 2d of March, 1847, T. assigned an undivided moiety of the premises comprised in the lease first mentioned, and of those comprised in the lease of the 18th of December, 1845, and of the mill and buildings thereon to A.; and on the 20th of September, 1847, assigned all his estate and effects to trustees for his creditors. By indenture of the 31st of August, 1848, S. and H. M. assigned to the defendant both plots of land, with the mill and buildings thereon, subject to such equity of redemption as was then existing. In April, 1852, the defendant sold the premises by auction, the conditions stating that he sold the whole as mortgagee of T.; but that as to the part comprised in the lease of the 18th of December, 1845, he had only the equitable interest, and the legal estate was not vested in him, and that the purchaser should accept as to this part such title as the vendor was able to deduce and convey. The plaintiffs purchased both plots, and paid the deposit thereon; but on the abstract of title being furnished, and T., refusing to join in the conveyance, they declined to complete, on the ground that the legal estate in the premises comprised in the lease of the 18th of December, 1845, was outstanding, and might be set up adversely to them. They then brought an action for the deposit:—

Held, that they were not entitled to recover as upon a failure of consideration, for that under the circumstances there was the same absolute power of sale as to the premises comprised in both leases, the deposit having been upon the same terms as the mortgage; and that even if this were not so, the conditions of sale had been complied with, the defendant having expressly stipulated to sell an equitable interest only.

This was a special case, the question being whether the plaintiffs were entitled to recover back 52*l.* paid as a deposit on the purchase of certain land sold by auction. The material facts were as follows.

The defendant put up certain lands, buildings and hereditaments for sale by auction, on the 13th of April, 1852, which were described as, "First the plot of land formerly taken out of and from the north-east corner of a field called the Hare Hill, demised by one indenture of lease, dated the 13th of May, 1783. Secondly, that plot of land

¹ PARKE, B., ALDERSON, B., PLATT, B., and MARTIN, B.² 23 Law J. Rep. (N. S.) Exch. 73; 9 Exch. Rep. 175; 2 Com. Law Rep. 418.

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theretofore taken out and divided from the same close of land called Hare Hill, demised by a lease dated the 18th of December, 1845, and also all that mill or factory, warehouse, cottage or dwelling-house, buildings and improvements now standing and being on the said respective plots of land or any part thereof, with the steam-engine, boiler, shafting, pipes and other the fixtures affixed, set up and now being in, about and belonging to the said mill and premises which are comprised and included in certain indentures of mortgage now produced, and dated the 24th of April, 1845, from W. Taylor, of Royton, to J. Scholefield, and the other dated the 27th of August, 1845, from the same W. Taylor to H. F. Milne, and all liberties and privileges thereto belonging, which said land, mill, and premises are now or lately were in the occupation of Messrs. Taylor & Atkinson. The land, buildings, &c. of the first lot are held for the residue of a term of 999 years under a lease dated the 13th of May, 1783, and those in the second, for the residue of a term of 980 years, under a lease dated the 18th of December, 1845. The whole of the above-mentioned premises are offered for sale by S. Mounsey, as mortgagee of W. Taylor: subject, as to the first lot, to a certain yearly payment of 12s. 6d., and the performance of the covenants and conditions in the lease of the 13th of May, 1783; and as to the second lot to a yearly rent of 4l. and the performance on the part of the purchasers of the covenants and conditions in the lease of the 18th of December, 1845." The condition as to the deposit was, that "the purchaser shall pay to the vendor, or his agent, at the conclusion of the sale, 10l. per cent. on the purchase-money, and the remainder on the 29th of June, and on payment thereof the purchase-deeds shall be executed by all proper parties, and the purchase completed, the purchaser to be entitled to the rents and profits from that day; in default of completion from any cause whatever, interest to be paid by the purchasers." Other conditions were, "That the vendor shall deliver an abstract of his title, commencing with the indentures of lease of the 13th of May, 1783, and the 18th of December, 1845, to the purchaser on or before the 17th of May next, and the purchaser shall prepare the requisite deed of assignment at his own expense, but he shall not be entitled to call for the production of the title previous to the said indentures of lease, or either of them. That all statements and recitals in any of the deeds or instruments of title, an abstract of which shall be delivered to the purchaser, shall be considered as conclusive evidence of the matters stated or recited. That inasmuch as the vendor has only the equitable interest in that portion of the property now offered for sale which is comprised in the said lease of the 18th of December, 1845, and the legal estate as to such part of the property is now vested in the vendor, yet, as between vendor and purchaser, the purchaser shall accept, as to the portion of the premises referred to, such title as the vendor is able to deduce and convey. That as the vendor is selling as mortgagee, he shall not be required to enter into any covenants for title with the purchaser, except that he has not done any act to incumber."

The plaintiffs having become the purchasers of both lots, paid 52l.

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as the deposit. The abstract of the title was duly furnished, and it commenced with a statement of the lease of the property first described in the conditions dated the 13th of May, 1783, for 999 years. The title to this property was deduced by various mesne assignments, and lastly by an assignment dated the 30th of January, 1845, to W. Taylor, for the residue of the said term of 999 years, created by the said indenture of the 13th of May, 1783. By indenture of the 24th of April, 1845, W. Taylor mortgaged the premises mentioned in lot 1. to J. Scholefield for 300*l.*, with an absolute power of sale on default of payment of principal or interest. On the same day Mr. Taylor gave J. Scholefield a memorandum, whereby he undertook to deposit with J. Scholefield a certain indenture of lease, the draft whereof was then prepared, and purporting to be made between R. Rainsbaw Rothwell, clerk, and R. R. Rothwell of the one part, and the said W. Taylor of the other part, when the same was executed as a further and collateral security to him for securing the repayment of 300*l.* and interest that day lent to him on mortgage of a certain mill and premises, situate at Hare Hill, in Royton. On the 27th of August, 1845, Taylor executed a second mortgage of the premises comprised in the mortgage of the 24th of April, 1845, to H. F. Milne. On the 18th of December, 1845, the lease to Taylor mentioned in the memorandum was executed. By indenture of the 31st of August, 1848, between J. Scholefield of the first part, H. F. Milne of the second part, and S. Mounsey, the defendant, of the third part, reciting the deeds of the 13th of May, 1783, the 24th of April, 1845, and the 27th of August, 1845, and that a portion of the land whereupon the mill and other buildings were erected and then standing was not included in the said recited indenture of demise, but was many years ago contracted to be taken on lease from the owner in fee thereof, and by the said indenture of the 18th of December, 1845, was demised to the said W. Taylor; and that the indenture of lease was after the execution thereof deposited with and was then in the custody of the said J. Scholefield, in compliance with the terms of the said memorandum, and that there was due to J. Scholefield and H. F. Milne, respectively, the sums of 300*l.* and 100*l.*, besides interest. The land and premises and all buildings thereon comprised in the lease of the 18th of December, 1845, and all other the leasehold premises comprised in the said indenture were conveyed to the defendant, to hold for the residue of the term of 999 years, and 950 years, and all other the estate and interest of J. Scholefield, subject to the same right of redemption as was then existing. The premises comprised in the second lot were not included in either of the mortgages of the 24th of April, and the 27th of August, 1845. W. Taylor and by deed dated the 2d of March, 1847, assigned one certain messuage and part of the premises comprised in the said lease of the 13th of May, 1783, as of the said premises comprised in the said lease of the 18th of December, 1845, and of the mill and premises situate at Hare Hill, respectively, to J. Atkinson, and by deed of the 2d of May, 1847, executed a deed of assignment of that part of the premises and effects to J. Shaw and S. Heape, for the use of the said J. Shaw.

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lor's, creditors. The plaintiffs, by a requisition made in due time, required that W. Taylor should concur in the proposed conveyance, which was refused; and on the 28th of June, 1852, demanded the return of the deposit-money, and, this being also refused, the present action was brought.

At the trial, before Wightman, J., at the Liverpool Summer Assizes, 1853, it was insisted, on behalf of the plaintiffs, that the defendant had not shown such a title to the premises secondly described in the above conditions, and so much of the tenements, buildings, and erections as stood thereon, as he ought to have shown according to those conditions, inasmuch as those premises were not included in either of the mortgages of the 24th of April, 1845, and the 27th of August, 1845, and that the defendant had no power of sale as mortgagee either at law or in equity, nor any legal estate or executed trust estate, but was at most only an equitable mortgagee, subject to redemption on payment of the money for which such equitable security was given; and that the outstanding legal estate and the interest of the said W. Taylor or his assignees might be used adversely against a purchaser, and that nothing in the conditions of sale could lead to the supposition that the equitable estate or interest of the vendor was redeemable, but, on the contrary, that the conditions implied that the vendor had an absolute irredeemable equitable estate or some power of sale, the exercise of which would secure the enjoyment of possession by a purchaser against disturbance by the party having the outstanding legal estate. The defendant's counsel insisted that the title disclosed by the abstract was sufficient according to the conditions of sale. The verdict was found for the plaintiffs, subject to the opinion of the court as to their right to recover on the above facts.

Atherton, (with him *Tomlinson*,) for the plaintiffs. The defendant was bound to give a good title, by which is meant that he was bound to transfer the legal estate to the plaintiffs. Without Taylor's concurrence only an equitable interest would pass, and a bill of foreclosure would be required for the purchaser's security; and in that case Taylor would be entitled to six months' notice, just the same as if there had been a complete legal mortgage. *Parker v. Housefield*, 2 Myl. & K. 419. There was no power of sale given or intended to be given as to the premises included in the second lot, and unless the purchaser could take the two lots together the purchase was comparatively valueless.

[PARKE, B. Does not the transaction show that both plots of land were intended to be a security on the same terms?

ALDERSON, B. Suppose a portion of land is conveyed by a legal mortgage, with a power of sale upon certain conditions specified in the deed, and there is on the same day an agreement for a deposit of a lease with the mortgagee as a collateral security for the mortgage money; would not a court of equity hold, that the mortgagee might enforce the equitable mortgage on the same terms as the legal mortgage?

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POLLOCK, C. B. The question is, has the defendant the equitable interest which he specifies in the conditions of sale?]

The words "equitable interest" are ambiguous, and would have been satisfied if the defendant had been mortgagee of the legal estate and equitably entitled to the estate by reason of the non-performance of the conditions. The plaintiffs are not put in possession of the rents and profits, and cannot be secure without a suit in chancery. The terms of conditions of sale must be clear and unambiguous to relieve the vendor from his ordinary liability to give a legal title to the purchaser. Numerous cases, both in the courts of law and in equity, show this. He referred to *Symons v. James*, 1 You. & C. C. C. 487; *Taylor v. Martindale*, 1 You. & C. C. C. 658; *Seaton v. Mapp*, 2 Coll. C. C. 556; *Shepherd v. Keatley*, 1 Cr. M. & R. 117; *Coverley v. Burrell*, 5 B. & Ald. 257; *Sellick v. Trevor*, 11 Mee. & W. 722; *Dykes v. Blake*, 4 Bing. N. C. 463; *Ballard v. Way*, 1 Mee. & W. 520; *Spratt v. Jeffrey*, 10 B. & C. 249. Where a person professes to sell an equitable interest, the purchaser has a right to suppose that it is under such circumstances that the legal estate cannot be used adversely to him. 1 Sug. Ven. & Pur. p. 495, last edition.

Cowling, for the defendant. There has been no failure of consideration, for the plaintiffs might have had all they bargained for. The defendant is in the same position as Scholefield. Now, Taylor held the premises, which were on two distinct plots of land. Of one he had not a lease, but an agreement only, but when the 300*l.* was lent, it is clear that Taylor intended both to be one security; and it must have been intended that the mortgagee should have the power of selling both. (He was then stopped by the court.)

POLLOCK, C. B. The defendant is entitled to judgment. The deposit is claimed on the ground that the defendant has not made out a sufficient title. The question is, whether, within the principle established by numerous authorities, the description of the property is so ambiguous as to mislead. I think that it is not. The facts shortly are, that there was a mortgage of one entire set of premises; the mortgagor had a lease of one part and an agreement as to the other, but the whole was one transaction, one loan, and one security. It is said that the plaintiffs are entitled to recover because they could not expect that the owner of the legal estate would be opposed to them; but the condition is, that the vendor had only an equitable interest, which is not the same as an equitable estate. Then it is contended that this is an ambiguous phrase, and it must be construed most strongly against the vendor. There is a great fallacy in confusing that which is ambiguous with that which is comprehensive or general. A word is ambiguous when it may mean one thing or another, but it is not ambiguous because it is ~~more~~ general, and may include several things. Thus, if a person agrees to sell a horse, the expression is not ambiguous, although it is uncertain what the horse is. So, an "equitable interest" is not an ambiguous phrase because it may mean one description of equitable interest or another.

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Where such a general phrase is used the purchaser should inquire what is meant by it. I concur, however, in thinking that the deposit of the lease was upon the same terms as the mortgage.

PARKE, B. I am of the same opinion. The question is, whether the consideration has failed, that is, whether the conditions of sale have been complied with. Two distinct lots were sold. As to the first, no question is raised. The second lot is described as demised by a lease of the 18th of December, 1845; but the conditions of sale state that, as the vendor has only the equitable interest in that portion of the property, the purchaser shall accept such title as the vendor is able to deduce and convey. It is contended that this condition is to be construed most strongly against the vendor. *Prima facie* every vendor must be able to convey the legal estate; but that obligation is cut down by the words used in this condition. It is also stated that he is selling as mortgagee. Then, has he a power of sale? I think that Taylor clearly could not have redeemed the portion of the premises included in the lease of the 18th of December 1845. There is first a legal mortgage and at the same time a memorandum signed, undertaking to deposit a lease of the other portion of the property when it should be executed, and the lease is subsequently deposited. It is contended that he had a right to six months' notice before sale. In *Pain v. Smith*, 2 Myl. & K. 417, a distinction was drawn between an ordinary deposit as a security and a deposit previous to a mortgage. But in *Thorpe v. Gartside*, 2 You. & C. 730, my brother Alderson held, that upon an equitable mortgage the mortgagor was entitled to six months' notice before sale. Here, however, there is not a simple deposit, but a legal mortgage of one part, with an express power of sale without notice, and a deposit of the lease of the other part; and if the mortgagor was to be entitled to six months' notice as to one part, the power of sale as to the other would be of very little use. It seems to me clear that the deposit was upon the terms of the original mortgage, and that Taylor has precluded himself from redeeming. It was all one transaction, and Taylor meant to give the power of sale over the whole property. Whatever the rule, therefore, may be as to notice, here there was a power of sale over the whole. Therefore, even assuming, for the sake of argument, that the condition is ambiguous, the owner of the legal estate could not, in this instance, have put himself in opposition to the purchaser.

ALDERSON, B. I am of the same opinion. These are mere questions of fact. Where there is a deed the terms are stated, but on a deposit the circumstances are looked to. It may be that the deposit is only preparatory to a mortgage; but if it is made as a security for sale, it may be enforced without time for redemption. Here the circumstances show that the second lease was deposited subject to the same conditions as the legal mortgage, and therefore with an absolute power of sale. Even had this not been so clear, still the defendant would have been protected by the conditions of sale. He professed only to

Gallwey v. Marshall.

have an equitable interest to assign, and that bargain he has been ready to fulfil.

PLATT, B., concurred.

Judgment for the defendant.

GALLWEY v. MARSHALL.

December 8, 1853.

Slander — Clergyman — Holy Orders — Common Law Procedure Act, Sect. 61.

A declaration for slander by charging a clergyman in holy orders with incontinency, is bad without showing actual damage, or that he holds some office or employment producing temporal profit.

The 61st section of the Common Law Procedure Act does not remedy such an omission.

THE declaration stated, that before and at the time of the malicious speaking hereinafter mentioned, the plaintiff was in holy orders as a clergyman of the Church of England, and before the said malicious speaking, and whilst he was in holy orders and was residing in Buckinghamshire, had been accused of having been guilty of incontinence with a certain woman, and of being the father, or putative father, of a certain bastard child, and had been summoned to show cause why he should not contribute to the maintenance of the said child; and on the hearing of the said summons had been adjudged not to have been guilty of incontinence with the said woman, and not to be the father of the said bastard child; yet the defendant in a conversation about the premises with a certain person, to wit, one Anne Horncastle, falsely and maliciously spoke and published of the plaintiff in his character of a clergyman of the Church of England the words following, that is to say: "If Mr. Appleton knows nothing against Mr. Gallwey" (meaning the plaintiff) "the bishop" (meaning the Lord Bishop of Lincoln) "does." And in answer to a question by the said Anne Horncastle what the said bishop knew against the plaintiff, the defendant falsely and maliciously spoke and published of the plaintiff as such clergyman the further words following, that is to say: why that gross affair in Buckinghamshire" (the defendant meaning thereby that the conduct of the plaintiff in and with respect to the said matter had been of a gross and scandalous nature, and that the plaintiff had been guilty of incontinence with the said woman, and was the father of the said bastard child.) Demurrer and joinder.

¹ 23 Law J. Rep. (N. S.) Exch. 78; 9 Exch. Rep. 292; 2 Com. Law Rep.*399.

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Turner, in support of the demurrer.¹ No special damage is alleged, and the words themselves do not relate to the plaintiff in his character as a beneficed clergyman so as to produce temporal loss to him. To charge a clergyman with incontinence is not actionable. *Parrot v. Carpenter*, Cro. Eliz. 502; s. c. Noy, 64. So to charge a physician with adultery is not actionable. *Ayre v. Craven*, 2 Ad. & El. 2; in which case, although the words were alleged to have been spoken of the plaintiff "in his profession," judgment was arrested after verdict for the plaintiff. So in *Pemberton v. Colls*, 10 Q. B. Rep. 461, a count charging as slander that the defendant had said of the plaintiff that he had pigeoned the defendant was held bad. In *Hopwood v. Thorn*, 8 Com. B. Rep. 293, words imputing misconduct to the plaintiff, a dissenting minister, but before he became such minister, were held not to be actionable, because they had no relation to his conduct as a minister, and no connection with the duties of his office. In *James v. Brook*, 9 Q. B. Rep. 7, where the plaintiff was a superintendent of police, the judgment was arrested because the declaration did not show how the words related to the plaintiff in his office. In *Dod v. Robinson*, Aleyne, 63, which it will be contended overruled *Parrot v. Carpenter*, it was expressly stated in the declaration that the plaintiff was instituted and inducted as parson and executed the office of a pastor. He also cited Starkie on Slander, 126, 2d edit. The Church Discipline Act, 3 & 4 Vict. c. 86, does not impose new liabilities upon clergymen, but only regulates the mode of proceeding.

Willes, contra. The authorities are so extraordinary upon the subject of slander upon a person in his profession that they cannot be upheld. It is not requisite, where the charge is of such a nature as necessarily to affect a man in his office or business, to connect it with that office or business. *Jones v. Littler*, 7 Mee. & W. 423. Now a clergyman must necessarily be injured by a charge of incontinence. Whether he is beneficed or not, as a clergyman he fills an office which demands purity of character. He may administer the sacrament, perform the rites of baptism, marriages, &c., and he may be degraded for incontinence. Roger's Ecclesiastical Law, 306. *Eree v. Burgoyne*, 2 Hag. Ec. 456, 662. Charging a clergyman with incontinence is very different from charging a layman. *Ireland v. Smith*, 2 Brownl. 166. A layman would only be prosecuted in the Ecclesiastical Court *pro salute animæ*. The proceedings under the Church Discipline Act are *in pœnam*. He referred to 1 Hen. 7, c. 4, and 3 & 4 Vict. c. 86. *Parrot v. Carpenter* was overruled by *Dod v. Robinson*. No reason was given in the judgment in *Pemberton v. Colls*, except that the imputation did not appear to the court to reflect upon the plaintiff in his professional character, which was somewhat strange. But it is sufficiently shown in this declaration by the colloquium which refers to the bishop, and his knowledge of the plaintiff's conduct, that the words referred to the plaintiff in the profession of a clergyman. Further, under the

¹ Nov. 21, before POLLOCK, C. B. PARKE, B., ALDERSON, B., and PLATT, B.

Gallwey v. Marshall.

61st section of the Common Law Procedure Act,¹ it is unnecessary to state in the declaration how the words were used in a defamatory sense. It is for the jury to say whether they were so used; and if so, the action is maintainable.

Turner, in reply. The enactment just cited does not dispense with material statements, but merely means that if the words appear to be actionable, they are so to be construed, unless shown to mean the contrary. Consistently with the authorities, this declaration cannot be supported. It is not sufficient that the words affect the plaintiff's professional success, for it has been held that a schoolmistress cannot maintain an action for a charge of prostitution. *Wharton v. Brook*, 1 Ventr. 21.

Our. adv. vult.

Judgment was now delivered by —

POLLOCK, C. B. After stating the declaration, his lordship proceeded: We should have had no doubt in the present case of the plaintiff's right to recover if the declaration had averred that the plaintiff was a beneficed clergyman, or was in the actual receipt of professional beneficial emoluments, as a preacher, lecturer, curate, or the like, at the time of the speaking of the words; as the charge, if true, would have been a cause of deprivation of the benefice in the first place, and also degradation of orders, and consequently of the loss of temporal emolument in the other case. This point was decided in *Dr. Sibthorpe's case*, W. Jones, 366; s. c. 1 Rol. Abr. 58; *Dod v. Robinson*, in effect overruling the case relied on for the defendant, of *Parrat v. Carpenter*, in which case the court held that the slander was examinable in the spiritual court only, and the reason assigned in Aleyne is, "that the matter charged is good cause to have him degraded, whereby he shall lose his freehold, which is a temporal damage;" and the reason given in 1 Rol. Abr. is, "that he could have temporal damage by the speaking of the slander." To the same effect is the doctrine of Lord Holt as to an imputation of a want of learning being actionable in *Coxeter v. Parsons*, 1 Lord Raym. 423; s. c. 2 Salk. 692. In the case in Aleyne, the words imputed to the plaintiff not only incontinence, but preaching false doctrine, both of which were causes of degradation, and consequently deprivation, and the latter charge implied misconduct in his office. But we think it clear that the charge of incontinence made against a beneficed clergyman, and alleged to have been committed whilst he is beneficed, is of that nature that necessarily tends to do him injury in his professional character, and to endanger him in the enjoyment of his office as a parson, and is

¹ That section enacts that, "In actions of libel and slander, the plaintiff shall be at liberty to aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient."

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therefore actionable. In this respect the charge differs from that which was the subject of the second count in the case of *Pemberton v. Colls*, but in the absence of any averment of the plaintiff's having any office or employment producing temporal benefit, we are not satisfied that this action will lie. There is no authority to be found, that we are aware of, in support of the position that an action will lie in a case where there is no actual damage. The words are actionable in the spiritual court, as they have authority to inquire into and punish incontinence, and there only; and if the plaintiff be in order merely, and not in possession of any temporal advantage as having professional occupation, the only remedy appears to be in the Ecclesiastical Court. If incontinence were a crime punishable by temporal punishment, the words spoken might fall within the ordinary rule that words are actionable which charge an offence liable to temporal punishment. But the statute of 1 Hen. 7, c. 4, gives jurisdiction to punish incontinence in ecclesiastics to archbishops, bishops, and ordinaries only, and the Clergy Discipline Act, 3 & 4 Vict. c. 86, does not make such an offence punishable by temporal punishment. Both of these statutes are for giving additional powers to ecclesiastical tribunals only. We therefore think, upon carefully looking at all the authorities, that we ought not to hold the action to be maintainable.

PLATT, B., added: In this case, in which judgment has just been delivered, I have throughout entertained a very considerable doubt whether the judgment is correct: at the same time my doubts are not of that description that would induce me to differ, ultimately, with the court; and, therefore, the judgment that has been pronounced will be the judgment of the whole court. I own it did strike me that the speaking of words slanderous of a party which, if true, was a sufficient ground to deprive him of his *status*, was actionable: that was my impression. Now, here it appears that the clergyman was without a benefice. But there are two sorts of deprivation to which ecclesiastics are liable: there is the deprivation *à beneficio*; there is another deprivation *ab officio*; and here he was a beneficed clergyman, and had that *officium* of which he might be deprived. That certainly has created a great doubt in my mind; and on that ground I thought that language which might deprive him of his office, and therefore of his *status*, was actionable. However, the other members of the court have broken into my opinion upon that subject so far as to lead me to concur generally in the judgment which has been given.

Judgment for the defendant.

Cowburn v. Wearing and Wilkinson.

COWBURN v. WEARING and WILKINSON.

November 5, 1853.

Amendment of Declaration by striking out a Defendant — Common Law Procedure Act — Statute of Limitations.

A judge made an order for amending the declaration, by striking out one of the defendants, the other to be at liberty to plead the non-joinder of a co-defendant in abatement, and also *de novo*. The plaintiff had previously brought an action against the defendants for some part of the same subject-matter, but failed to prove the joint liability of the defendants; and on an application for a new trial, on the ground of surprise, stated that he could have proved the joint liability of the defendants. On that occasion the court refused, after the trial, to amend by striking out the name of one defendant. The plaintiff, in support of his present application to amend, stated that the evidence to be adduced in the present case, was similar to that relied on on the other trial: —

Held, that the judge was right in ordering the amendment.

THIS was a rule calling on the plaintiff to show cause why an order of Martin, B., should not be rescinded. The order was, that on payment of the costs of the defendant, Wilkinson, the plaintiff, should have leave to amend the declaration, &c., by striking out the name of Wilkinson as defendant, the other defendant being at liberty to plead non-joinder of defendants and also *de novo*. The action was brought in 1852, to recover a balance of a claim for work done by the plaintiff, as solicitor to the defendants in a projected railway company, between the years 1846 and 1850. In 1851 the plaintiff and his then partner had brought an action against the present defendants in respect of the same railway, and failed for want of proving a joint liability on the part of the two defendants. A rule for a new trial having been then obtained, and afterwards discharged, the plaintiff applied to amend, by striking out the name of the defendant Wilkinson; which application was refused.

The affidavits on which the order was obtained stated that the evidence to be given in the present action was similar to that given in the former action, and that if the present action were discontinued, and a new action were commenced, a large portion of the claim would be liable to be barred by the Statute of Limitations. It was further stated that, in an affidavit used on the former occasion it was alleged that the plaintiffs could have proved that Wilkinson was jointly liable with Wearing for the payment of the plaintiff's demand.

Manisty, for the defendants, now moved to rescind the above order. The plaintiff has been allowed to do that which on a former occasion and in a similar case was refused.

[MARTIN, B. I acted under the 15 & 16 Vict. c. 76, s. 37, the Common Law Procedure Act.

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POLLOCK, C. B. On the former occasion the amendment was sought to be made after the trial.]

Here the plaintiff seeks to strike out the name of one defendant although his affidavits state that he has evidence sufficient to establish the joint liability of both.

[POLLOCK, C. B. The plaintiff thinks he is incurring a risk in suing both defendants.]

It cannot be shown either that the plaintiff has been mistaken, or has been misled by the other side, as was the case in *Cranford v. Cocks*, 6 Exch. Rep. 287; s. c. 3 Eng. Rep. 594.

POLLOCK, C. B. This application must be refused. It is reasonable that the plaintiff should be allowed before trial to amend the proceedings, and endeavor to make out a case against one defendant alone, especially as he takes the risk of a plea in abatement, and pays all the costs of the amendment.

PARKE, B., ALDERSON, B., and MARTIN, B., concurred.

Rule refused

PALMER v. COOPER and others.

November 11, 1853.

Patent — Particulars of Objection.

Particulars of objections delivered under the 15 & 16 Vict. c. 83, s. 41, by a defendant in an action for an infringement of a patent, must state the place at or in which the invention is alleged to have been used or published prior to the date of the letters-patent, and no evidence of such prior user or publication will be admitted, if the particulars of objection are defective on this point.

THIS was an action for the infringement of a patent "for certain improvements in the manufacture of candles, and also in the machinery for the manufacture of such matters."

Pleas — Not guilty; that the plaintiff was not the first inventor; that the invention was not new; that the specification was not sufficient; that the invention was not the subject of a patent: upon all which issue was joined.

The particulars of breaches delivered specified certain sales by the defendants at their place of business in or near the town of Manchester.

With the pleas particulars of objections were delivered, which stated: — first, that the candles sold by the defendants resemble candles made and sold before the date of the patent more closely than

¹ 23 Law J. Rep. (N. S.) Exch. 82; 9 Exchequer Rep. 231; 2 Com. Law Rep. 430.

they resemble the candles described in the specification. Second, the use of coiled wicks and twisted cotton in the form of a helix was not a new invention in the manufacture of candles at the date of the said patent, nor was the plaintiff the inventor thereof. Third, the application of metallic thread or yarn in candle-wicks was not a new invention in the manufacture of candles at the date of the patent, nor was the plaintiff the inventor thereof. Fourth, the gymping of wicks or a gymped wick was not a new invention in the manufacture of candles at the date of the said letters-patent, nor was the plaintiff the inventor thereof. Fifth, the application of bismuth to the wick of candles was not a new invention at the date of the said letters-patent, nor was the plaintiff the inventor thereof. Sixth, candles having wicks gimped were made and sold by the defendants, Messrs. Palmer & Co. of London, Bull of Leek, Staffordshire, Joseph Morgan of Manchester, or some or one of them, prior to the patent. Seventh, candles with a wick or wicks to which, or to some portion of which, bismuth and other substances producing a similar effect had been applied, were made and sold by the defendants, by Messrs. Palmer & Co. of London, by W. Thatcher of Manchester, or some or one of them, before the date of the said letters-patent. Eighth, candles and candle-wicks substantially the same as are alleged by the plaintiff to be an infringement of his said letters-patent are described in the specification of letters-patent granted to William Palmer on or about the 9th of November, 1841, in Newton's London Journal, for June, 1843, in the specification of letters-patent granted to Joseph Morgan, on or about the 11th of February, A. D., 1843, and in other specifications and books relating to this subject.

The other objections are not material to notice. Before the trial the following order was obtained from Martin, B. : — " Upon hearing the attorneys or agents for the plaintiff and counsel for the defendants, I do order that, as to the first objection, the defendants shall be confined to not guilty, and no evidence shall be given by the defendants in support of the second, third, fourth, and fifth, of the objections in the defendant's notice, dated the 5th of February, 1853, except the several acts of user and publications in the several other particulars of objections mentioned ; and that as to the eighth objection, the defendants shall state, on or before Saturday next, what page of Newton's London Journal is referred to, and what are the other specifications and books referred to ; and in default thereof the defendants shall be precluded from giving evidence at the trial in respect of such objections." Further particulars were delivered, specifying what was required in the eighth objection ; but no additional particulars were given as to the use of the coiled wicks.

At the trial, before Pollock, C. B., at the Sittings in London after Trinity term, it appeared that the patent was for candles made with gymped wicks, candles with metallic wicks, and candles made with coiled wicks. Evidence was offered by the defendants of the user of the candles with coiled wicks before the date of the plaintiff's patent. This was objected to on the ground that the user of this kind of candle had not been sufficiently specified by the particulars of objec-

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tions, no place where the alleged user had taken place being mentioned, as required by the 15 & 16 Vict. c. 83, s. 41.¹ The Lord Chief Baron admitted the evidence, and a verdict was found for the defendants on all the issues, except not guilty, which was found for the plaintiff, leave being reserved to the plaintiff to move as to the admissibility of the evidence. A rule *nisi* for a new trial was accordingly obtained; against which

Knowles, Tomlinson, and Hindmarch showed cause. The act of parliament was substantially complied with, for the particulars of objections when read with the particulars of breaches gave the plaintiff sufficient information. In the particulars of breaches the place where the candles were sold is mentioned.

[ALDERSON, B. The statute says that the place at which the invention has been used is to be named, that the plaintiffs may make inquiries.]

If the particulars were not sufficient, application might have been made to have them amended.

[PARKE, B. The statute is express that the place is to be mentioned in such particulars.]

F. Thesiger (with him *M. Smith* and *G. Chance*) was not heard in support of the rule.

PARKE, B. The 41st section is imperative, and the place where the invention was used ought to be mentioned. It would be better that particulars of this kind should in future state, that Messrs. A. B. at London, instead of of London, used the subject of the invention.

POLLOCK, C. B. The evidence ought not to have been admitted.

ALDERSON, B., and PLATT, B., concurred.

*Rule absolute.*²

¹ That section enacts that, "In any action in any of her Majesty's superior courts of record at Westminster or in Dublin for the infringement of letters-patent, the plaintiff shall deliver, with his declaration, particulars of the breaches complained of in the said action, and the defendant, on pleading thereto, shall deliver, with his pleas, and the prosecutor in any proceedings by *scire facias* to repeal letters-patent, shall deliver, with his declaration, particulars of any objections on which he means to rely at the trial in support of the pleas in the said action or of the suggestions of the said declaration in the proceedings by *scire facias* respectively; and at the trial of such action or proceeding by *scire facias*, no evidence shall be allowed to be given in support of any alleged infringement or of any objection impeaching the validity of such letters-patent which shall not be contained in the particulars delivered as aforesaid: Provided always, that the place or places at or in which and in what manner the invention is alleged to have been used or published prior to the date of the letters-patent, shall be stated in such particulars: Provided, also, that it shall and may be lawful for any judge at chambers to allow such plaintiff or defendant or prosecutor respectively to amend the particulars delivered as aforesaid, upon such terms as to such judge shall seem fit: Provided, also, that at the trial of any proceeding by *scire facias* to repeal letters-patent, the defendant shall be entitled to begin and to give evidence in support of such letters-patent, and in case evidence shall be adduced on the part of the prosecutor impeaching the validity of such letters-patent, the defendant shall be entitled to the reply."

² Pending the argument, the court intimated that, according to *Hughes v. Hughes*,

Smith v. Peat.

SMITH v. PEAT.¹

November 17, 1853.

Lease — Assignment — Covenant to Repair — Action by Lessee against Assignee — Evidence — Damages.

Covenant by lessee against an assignee for damages occasioned by the non-repair of premises by the assignee whilst he was such, pursuant to his covenant. It appeared that in 1843 the plaintiff assigned the lease to the defendant; that in October, 1851, the defendant assigned to one T.; that in June, 1852, T. assigned the lease to H., who, in August, 1852, surrendered it to the ground landlord. Evidence was given for the plaintiff, that when H. held the lease, the premises were out of repair, and T. stated that he put the premises in no better state than when he received them from the defendant. No further evidence was given, and the defendant was not called as a witness:—

Held, that the judge was right in directing the jury to give substantial damages; and that the jury were warranted in presuming that the dilapidations took place during the time the defendant held the lease.

COVENANT. The declaration stated that the plaintiff was possessed, for the residue of a term of twenty-one years from 1839, of a house, &c., which term was created by a deed, whereby G. T.; and W. T., and T. Smith, devised, &c., the same to the plaintiff for the said term. Covenant with the said T. Smith that the plaintiff should at all times repair the house, and keep it in repair, and would in 1842, and every third year, paint the outside wood, &c., and in 1846, and every seventh year, paint the interior; that the plaintiff assigned the said term to the defendant, to hold for the residue of the term, subject to the performance of the covenants in the lease contained which were on the tenant's part to be performed. Averment — That the defendant entered and was possessed of the house for the residue of the term. Breaches, that whilst the defendant remained possessed, the house was out of repair; that the defendant did not, in every third year, paint the wood, &c., and did not, in 1846, paint the interior; by reason of which the plaintiff was compelled to pay to T. Smith 100*l.* as damages for breaches of covenant.

The pleas traversed the breaches and the payment by the plaintiff.

At the trial, before Martin, B., at the Middlesex Sitzings in Michaelmas term, the facts were these:— A lease of the house, &c., was granted to the plaintiff for twenty-one years from the 25th of December, 1839, containing the covenants in question. In 1843 the plaintiff assigned the lease to the defendant. The defendant, after holding the premises till 1851, assigned the lease to one Trigwell. In June, 1852, Trigwell assigned the lease to Howard, as trustee for the plaintiff; and, in August, 1852, Howard surrendered it to T. Smith, the

15 Mee. & W. 701, a new trial would not be granted if the defendants would give up the verdict on the issues not affected by the evidence objected to; but the defendants preferred having a new trial.

¹ 23 Law J. Rep. (N. S.) Exch. 84; 9 Exchequer Rep. 181; 2 Com. Law Rep. 424.

Smith v. Peat.

ground landlord. It was stated by Trigwell that when he took possession of the premises from the defendant they were out of repair, and that whilst he held the lease he did not repair the premises, and that the premises were much damaged by a distress put in by T. Smith, the ground landlord. A surveyor, who surveyed the premises in July, 1852, stated that 53*l.* would be required to put the premises in repair pursuant to the covenant. The plaintiff, on the surrender of the lease, paid to T. Smith 40*l.* on account of dilapidations. For the defendant it was contended that the plaintiff was entitled to nominal damages only. The judge was of opinion that the plaintiff was entitled to substantial damages, and directed the jury to assess the amount, deducting the damage occasioned by the ground landlord's distress. The jury found for the plaintiff, damages 35*l.*

Bramwell, (T. J. Clark with him) now moved for a new trial, on the ground of misdirection. The judge was in error in directing the jury to give substantial damages. The defendant as assignee was liable for the damages arising from want of repairs during the term of his occupation. But the plaintiff omitted to give evidence of the condition of the premises as to repair at the time of the first assignment, or of the subsequent assignment by the defendant to Trigwell, or that of Trigwell to Howard.

[PARKE, B. *Wolveridge v. Steward*, 1 Cr. & M. 644, decides that where a lease is assigned "subject to the payment of rent and performance of the covenants," &c., the assignee is not liable after he has assigned over. In *Burnett v. Lynch*, 5 B. & C. 589, the declaration stated that the breaches of covenant took place whilst the defendant remained assignee.]

The plaintiff, therefore, ought to have shown affirmatively what damage had been occasioned during the respective occupations of the plaintiff, the defendant, and the other parties.

[PARKE, B. It was in the power of the defendant to prove the state of the premises at the time he took them.

ALDERSON, B., referred to *Burdett v. Withers*, 7 Ad. & E. 136.]

It has not been proved that any deterioration took place during the time the defendant held the premises. *Doe d. Worcester Trustees v. Rowlands*, 9 Car. & P. 734, is in point.

POLLOCK, C. B. I think my brother Martin directed the jury rightly in this case. He was not bound to tell the jury to give nominal damages only. It is difficult to ascertain to what extent premises are damaged during the holding of each assignee. The presumption from the fact that the defendant making no complaint of the premises at the time he took them, is either that they were in a good state of repair or that he received money to put them into repair. At all events he might have been called to prove the state of the premises at the time of the assignment to him.

PARKE, B. I am of the same opinion. Where there exists a covenant to repair, the lessor is entitled to have the premises in good

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repair; and, in *Furios v. Champion*, 2 Ld. Raym. 1125, Lord Holt was of opinion that the measure of damages was the amount it would require to put the premises into repair. It is true that view has been departed from in subsequent cases. In *Doe d. Worcester Trustees v. Rowlands*, my brother Coleridge ruled that the amount of damage was the amount of injury done to the possession by the premises being out of repair. It is not necessary now to say whether or not that view is correct.

ALDERSON, B. The plaintiff is entitled to more than nominal damages. The premises were out of repair when Howard took the lease in 1852. He took them from Trigwell, who stated that he put them in no better condition than when he received them from the defendant. The premises were, therefore, out of repair in the defendant's time, and as he was not called to contradict that evidence, the jury were warranted in presuming that the dilapidations took place in his time.

MARTIN, B. I think the jury were warranted in concluding that the dilapidations took place during the time that the defendant held the lease. We never can ascertain the exact amount of damage which occurred during the time that each assignee held the lease. In my opinion, the measure of damages is the loss the market would undergo if he sold his reversion in the market.

Bale refused.

HALL v. SCOTSON.¹

November 24, 1853.

Practice — Common Law Procedure Act, Construction of — Rescinding Judges's Order — Affidavits.

By the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 27, in case of the non-appearance of the defendant where the writ of summons is indorsed in the special form therein provided, the plaintiff is enabled, on filing a judge's order for leave to proceed under the provisions of the act, and a copy of the writ of summons, at once to sign final judgment in the form contained in the schedule to the act. And by the same section it is enacted, that "it shall be lawful for the court or a judge, either before or after final judgment, to let in the defendant to defend upon an application supported by satisfactory affidavits accounting for the non-appearance, and disclosing a defence upon the merits":—

Held, that an application to rescind the judge's order may be made on affidavits contradicting those upon which the order was obtained, without disclosing a defence upon the merits.

Quere, whether, if the order stands, the judgment signed in pursuance of it can be set aside without such affidavits as are mentioned in the statute.

Quere, whether the words of the 27th section, being affirmative, take away the general power of the court over its judgments, or are merely cumulative.

¹ 23 Law J. Rep. (N. S.) Exch. 85; 9 Exchequer Rep. 280.

Hall v. Scotson.

THIS was a rule calling on the defendant to show cause why an order of Crompton, J., of the 26th of October, should not be set aside. The affidavits stated that the action was brought to recover the penalty of 100*l.* from the defendant, for keeping a house for music and dancing, without having a license. The summons issued on the 17th of September, and was specially indorsed under the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 27. The following was the form of the special indorsement:—"This action is brought to recover the sum of 100*l.*, forfeited by the defendant, under the 25 Geo. 2, c. 36, s. 2." The plaintiff having in vain endeavored to serve the defendant personally with the writ of summons, obtained an order from Lord Campbell, C. J., on the ground of the impossibility of effecting such service. By this order the plaintiff had leave to proceed with the action, "as if personal service had been effected on the defendant, upon notice of application having been made for this order, and a copy thereof having been left at the defendant's residence; but that no execution issue until eight days after such notice has been given and copy left as aforesaid." On the 19th of October, a copy of this order and notice of the application were left at the defendant's residence, and on the same day the plaintiff signed final judgment in the action for 100*l.* and costs. On the 26th of October, Crompton, J., made the following order, now sought to be rescinded: "That upon payment of 2*l.* costs, the judgment be set aside, and the defendant be let in to appear and defend, and that he do appear forthwith." The defendant not having produced an affidavit at the hearing of the summons, it was objected, in behalf of the plaintiff, that the statute required both an affidavit accounting for the non-appearance, and also an affidavit of merits. The learned judge was of opinion, that the judgment signed was irregular, on the grounds that the defendant ought to have had notice that he was to consider himself personally served with the writ of summons, and that he should also have had a reasonable time to appear after service of such order, and before the judgment was signed, and that there was no "debt" within the meaning of the act.

Hawkins showed cause. The judgment was irregularly signed, and the order ought not to be rescinded. There ought, according to the statute, to be an interval of a reasonable time between the making of the order and notice of it, and final judgment. The latter part of the 27th section leads to this inference. Secondly, assuming the judgment to be regular, a judge may, without an affidavit of merits, set aside that judgment on equitable terms. The general authority of the court is not altered by the 27th section. An affidavit of merits ought not to be required in a case like the present, where the defence may depend on some arguable point of law.

[PARKE, B. I think the 27th section cannot render an affidavit from the defendant necessary in all cases. Suppose the application to sign judgment were founded upon false affidavits, can it be said that because the plaintiff has succeeded by means of such false statements, the defendant is to make an affidavit disclosing the merits of

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his defence? My notion is, that such an affidavit is required only when the judgment has been regularly signed.

ALDERSON, B. I quite agree that would be the case where the application is to set aside the judge's order only.

PARKE, B. I think the learned judge was in error in saying that the plaintiff was not entitled to sign judgment until a reasonable time after a copy of the order had been brought to the defendant's notice.

ALDERSON, B. It may be that an affidavit by the defendant, stating that he believes he is not guilty, would be sufficient in a case like this.]

Lush, in support of the rule, offered to dispense with an affidavit of merits on the defendant producing an affidavit accounting for his non-appearance upon payment of costs, which offer was accepted on behalf of the defendant.

*Per Curiam.*¹ On these terms, then, the rule will be discharged, otherwise it will be absolute.

*Rule accordingly.*²

HOCKPAYTON v. BUSSELL.³

November 25, 1853.

Insolvent — Arrest — Application for Discharge.

The defendant settled an action brought by the plaintiff by giving a judge's order for the payment of 100*l.* and costs by certain instalments. He then filed his petition in the Insolvent Debtors Court under 7 & 8 Vict. c. 96, and inserted the plaintiff in his schedule as a creditor for the amount specified in the judge's order. Default having been made in the payment of the instalments, judgment was signed. The defendant's examination was adjourned *sine die*, and on the same day he was arrested under a *ca. sa.*, at the suit of the plaintiff, upon the judgment so signed. He applied to a judge at chambers for his discharge, alleging that he was privileged from arrest at the time he was taken, because he was on his way to a judge's chambers. He was discharged on a second order being made for payment of the debt and costs by different instalments. The defendant shortly afterwards obtained an order protecting him from arrest under any process in respect of the debts due at the time of his filing his petition to the persons named in the schedule. He

¹ PARKE, B., ALDERSON, B., and PLATT, B.

² One of the learned judges handed the following note to a reporter:

"The court held, that an application to set aside the order may be made on affidavits contradicting the affidavits on which the order was obtained, without disclosing a defence on the merits; but they doubted whether, if the order stands, the judgment signed in pursuance of it can be set aside without such affidavits as are mentioned in the statute. The court doubted whether the words of the 27th section, being affirmative, took away the general power of the court over its judgments, or were merely cumulative; the penalty of final judgment, perhaps to a large amount, in a case of default of appearance, not capable of being denied, seeming excessive."

³ 23 Law J. Rep. (N. S.) Exch. 87; 9 Exchequer Rep. 279; 2 Com. Law Rep. 610.

Hockpayton v. Bussell.

was then arrested under a *ca. sa.* issued on a judgment signed under the second judge's order: —

Held, that he was entitled to be discharged, the arrest being in respect of the debt inserted in the schedule.

THIS was a rule calling on the plaintiff to show cause why the defendant should not be discharged out of custody, he having been arrested under a writ of *ca. sa.* upon a judgment for a debt in respect of which he was protected by an order of the Insolvent Debtors Court. It appeared from the affidavits that the defendant had, on the 10th of December, 1851, petitioned the Insolvent Debtors Court for protection, under the provisions of the 7 & 8 Vict. c. 96. In the schedule then filed the defendant stated the plaintiff to be a creditor for a debt of 100*l.* and costs, adding, "this creditor sued me in the Court of Exchequer for 135*l.* 1*s.* 11*d.*; I defended the action until the 25th of November, 1851, when the same was settled by my giving a judge's order for 100*l.*, part of the debt and costs as between attorney and client, such debt and costs to be paid, 1*l.* 10*s.* in a fortnight, and the balance by monthly instalments of 10*l.* each."

The defendant was opposed on the 26th of April, 1852, and his examination was adjourned *sine die*. Default had been made in the payment of the instalments, and judgment signed under the above order, and after the adjournment of his examination the defendant was arrested on a *ca. sa.* previously issued. On the 27th of April the defendant applied to a judge at chambers to be discharged, alleging that he had been arrested at a time when he was privileged, being on his way to the judge's chambers at Sergeants' Inn. The plaintiff opposed this application, and ultimately an order was made by consent of both plaintiff and defendant for the payment of the debt and costs by certain instalments, and on payment of the first, the defendant was discharged. Subsequently default was made in payment of the instalments, and judgment was entered up upon this second order. On the 31st of July, 1852, the defendant obtained his protection, the order stating in the usual form that the person of the defendant was protected from being taken or detained on any process whatever in respect of the several debts and sums of money due or claimed to be due, at the time of filing his said petition, from the defendant to the several persons named in his schedule as creditors. On the 22d of November he was arrested under a *ca. sa.* upon the last-mentioned judgment.

Pearce now moved to discharge him from custody. This order was made under the 7 & 8 Vict. c. 96, s. 28, and the defendant is protected from arrest in respect of the debts named in the schedule. The second judge's order was only a mode of varying the times of payment, but the second debt secured by it was the same.

The court then called on

Dowdeswell, who showed cause in the first instance. This was a new debt, or, at least, a new promise, made after the insertion of the debt in the schedule; and the existence of the debt was sufficient

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consideration for any agreement to pay it in a different mode. *True-
nan v. Fenton*, 1 Cowp. 544; *Kirkpatrick v. Tattersall*, 13 Mee. &
W. 766. There is no prohibition against new contracts in the 7 & 8
Vict. c. 96, as there is in 1 & 2 Vict. c. 110, s. 91, or 12 & 13 Vict.
c. 106, s. 204. Even under the 1 & 2 Vict. c. 110, relief has been
refused on motion, the defendant being left to plead. *Philpot v.*
Aslett, 4 Tyrw. 629; *Denne v. Knott*, 7 Mee. & W. 143. The appli-
cation for the discharge ought to have been made to the Insolvent
Court under the 59th section.

PARKE, B. The defendant is entitled to be discharged. The debt
in respect of which he was arrested is the same debt as that in his
schedule.

PLATT, B. This is clearly the proper court to apply to.

MARTIN, B. If this judgment is not for the original debt, there is
no doubt at all.

Rule absolute.

COUNTY COURT APPEAL.

BESWICK v. BOFFEY.¹

January 12, 1854.

County Court — Appeal, when it lies — Interpleader Proceeding — Jurisdiction.

No appeal lies from the decision of a county court judge on an interpleader proceeding arising out of a claim to goods taken in execution to satisfy a judgment of the County Court.

THIS was a case stated on appeal from the decision of the judge of the Clerkenwell County Court.

The case was entitled "*Beswick v. Boffey*, in the matter of the claim of Rosetta Moses," and stated that an interpleader application had been made under the following circumstances: — It alleged that the plaintiff had obtained judgment in the County Court for 54*l.* 13*s.* 6*d.*, the amount of both debt and costs in an action for goods sold and delivered (the original amount of the claim or of the debt proved was not specified); that he had caused execution to be levied for the amount of the judgment, and that on the levy being made, Rosetta Moses claimed the goods as her property. The usual interpleader summons was served upon the claimant, and the amount of the levy,

¹ 23 Law J. Rep. (N. S.) Exch. 89; 9 Exchequer Rep. 315; 2 Com. Law Rep. 502. Before POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

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58*l.* 6*s.* 2*d.*, was paid into court. On the interpleader case being called on before the county court judge, certain legal objections were taken on the part of Beswick, the execution creditor, to the particulars and grounds of claim and to the service of them. The county court judge overruled the objections, heard the case on its merits, and ordered a verdict to be entered for the claimant, with all costs, and directed the money paid into court to be paid out to her. The execution creditor appealed against the decision of the judge as to the sufficiency of the particulars of claim and service, and the case was stated with a view to the decision of a court of appeal upon them.

When the appeal came on in this court, on the counsel for the appellant, the execution creditor, commencing his argument,

Robinson, for the respondent, Rosetta Moses, interposed. There is a preliminary objection. This court has no jurisdiction to hear this appeal, for it is an appeal from the decision of a county court judge in an interpleader proceeding, and the statute 13 & 14 Vict. c. 61, s. 14, which alone gives the right of appeal, bestows it only on parties to causes dissatisfied with the decision of the judge on their causes. The appellant and respondent here are not the parties to the cause below. The respondent had nothing at all to do with the cause.

Ogle, for Beswick, the appellant. The court has jurisdiction to hear this appeal. The interpleader proceeding may be considered as a proceeding in the original action. It is a step taken with respect to the enforcing the execution. The statute, 9 & 10 Vict. c. 95, s. 118, provides for the case of a claim made to goods taken in execution of a judgment of the County Court, and directs the summoning of the claimant and the party issuing the process before the County Court, and gives the county court judge jurisdiction to adjudicate on the claim. Further, by the new rules of practice of the county courts, made under section 12 of the statute 12 & 13 Vict. c. 101, the claimant is made the plaintiff, and the execution creditor defendant in the interpleader proceeding. Rule 145. These rules have the force of an act of parliament. Thus the interpleader proceeding itself becomes a cause tried before the county court judge, and consequently the parties to it have the same right to appeal as parties in any other cause. The language of section 149 respecting appeals is quite wide enough to include an interpleader proceeding.

[He also went into an argument in support of the objections, which were purely of a technical character and irrespective of the merits, and which had been urged below with the view of precluding the claimant from showing that the property taken belonged to her and not to the defendant.]

POLLOCK, C. B. We are all of opinion that this appeal must be dismissed, and, I think, with costs. It appears to me that we have no jurisdiction in this matter. The power of appeal is given by the

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statute 13 & 14 Vict. c. 61, s. 14, and by that statute alone. But by another statute, 12 & 13 Vict. c. 101, s. 12, the legislature gave power to the Lord Chancellor to appoint a certain number of county court judges to frame proper rules of practice for their own courts. The rules have been framed and adopted by the judges of the superior courts pursuant to the act, and the point now is, whether these rules give a power of appeal in interpleader cases which did not exist before. Two questions are raised: first, what is the true construction of the rules 145 and 149 of the New County Court Rules; and, secondly, if they profess to give a power of appeal, whether such a provision is in accordance with the statute under which they were framed. As to the first point, I think it possibly arguable that the words of the rules 145 and 149 bear the construction imputed to them by the appellant; for rule 145 provides, that in the case of an interpleader proceeding, the claimant is to be deemed the plaintiff, and the execution creditor defendant. But looking at the whole of the two rules, I am of opinion that the true grammatical construction is in accordance with what I believe to have been their intention, and that they do not give any power of appeal. But, secondly, if the rules do in terms give such a power of appeal, I am of opinion that it is wholly *ultra vires*, for the judges who had to frame rules for governing the procedure in the county courts, had no authority to create an appeal in interpleader cases.

PARKE, B. I concur with the Chief Baron that we have no jurisdiction to entertain this appeal. An appeal certainly does not lie under the statute 13 & 14 Vict. c. 61, s. 14, for that section gives an appeal only to "the parties in a cause," before the county court judge, and the claimant here is no party to the cause. The analogy is preserved between interpleader cases in the county courts and in the superior courts; for in the latter, a claimant in an interpleader proceeding cannot bring a writ of error or tender a bill of exceptions. The question then is, whether an appeal is given by means of the New Rules of Practice of the County Courts made under the statute 12 & 13 Vict. c. 101. Now, the judges are by that act authorized only to make rules and orders for regulating the practice and proceedings of the county courts; and under those words they could not have power to alter the legislative provisions of another statute by giving a power of appeal to the superior courts. Nor, in my opinion, do the rules 145 and 149 give an appeal. It was only for the purpose of regulating the mode of proceeding in interpleader cases, that rule 145 provides that the claimant is to be deemed a plaintiff, and the execution creditor a defendant. But even if the judges did mean by those rules to give the power of appeal, I am of opinion that they had no authority to make such rules.

ALDERSON, B. I am of the same opinion. It seems to me that an appeal is intended by the act 12 & 13 Vict. c. 61, s. 14, to lie against a judgment, and that a judgment in an ordinary plaint, over which the county court judge has jurisdiction given him by the act of

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parliament. That jurisdiction is given in the case of a plaint for a sum not exceeding 50*l*. Or perhaps there may be an appeal when the parties, by consent, come before him, in a plaint for a larger amount. By section 14, in the case of an appeal, the appellant is to give security for costs and the amount of the judgment; but on an interpleader summons, what is the judgment, and how is the security for costs to be given? It is urged that the decision of a judge in an interpleader summons is in the nature of a judgment. I think that it is not. It is clear that the order made in an interpleader case is purely a discretionary order on the part of the judge. It regulates only the execution of the previous judgment in the plaint. Then, it is said that the 145th rule of practice makes the interpleader proceeding a cause, and the parties to it plaintiff and defendant. But the rule does not say that the interpleader summons shall be a plaint. It merely says that the interpleader summons shall be served in the same manner as a summons to appear to a plaint. All the rule meant, I think, was that the interpleader proceeding was to be carried on as a plaint. If this be a new plaint, as is contended, then the result ought to be the same as in an ordinary plaint, that is, that the successful party should be entitled to his costs; but that is not the case, as the costs in interpleader proceedings are in the discretion of the judge. Another objection would be, that though the original plaint was for a sum not exceeding 50*l*, the costs here make the interpleader proceeding a plaint for a sum above 50*l*, and there is no consent of parties here to give the judge jurisdiction to try a dispute for such an amount. This, then, is an appeal in a case in which if it were an original plaint, a county court would not have had any jurisdiction. I agree with the Chief Baron and my brother Parke that if the rules purport to give an appeal, the judges had no authority to make such rules: but I think they have not done so.

MARTIN, B. It is only necessary to read the act of parliament to see that no appeal is given by it in the present case. The cases in which an appeal lies under it are those of plaints, if the case be one of contract, where the amount of the demand is above 20*l*. and not exceeding 50*l*. It seems to me to be confined to those cases. Then, it is contended that rule 145 of the New Practice Rules gives the appeal, but I think that rule has been much misconstrued. Its object was to make the proceedings in interpleader in the county courts analogous to those in the superior courts, and it says that the claimant shall be deemed the plaintiff, and the execution creditor defendant. In the superior courts the judge always provides who is to be the plaintiff, and who defendant.

Appeal dismissed, with costs.

Groves v. Janssens.

COUNTY COURT APPEAL.

GROVES and others, Appellants v. JANSSENS, Respondent.¹

January 23, 1854.

County Court — Appeal, when it lies — Action by Consent.

No appeal lies from the decision of a county court judge in an action for an amount exceeding 50*l.*, brought before him by consent, under sect. 17 of the 13 & 14 Vict. c. 61.

THIS was an appeal from the decision of the judge of the County Court of Sheffield.

The action was brought by consent in the County Court. The particulars stated: — "This plaint is entered to recover 500*l.*, damages due from the defendants to the plaintiff upon a certain agreement in writing," &c. The judge decided that the defendants, the appellants, had broken their contract, and gave judgment for the plaintiff, Janssens, for 50*l.*

. On the counsel for the appellants commencing his argument (January 16,)

Willes, for the respondent, the plaintiff below, interposed. There is a preliminary objection. This court has no jurisdiction to hear this appeal. This is a cause in which the claim exceeds 50*l.*, and the county court judge has jurisdiction only by virtue of the consent of the parties under section 17 of the statute 13 & 14 Vict. c. 61. The appeal clause, s. 14, gives the appeal to "either party in any cause of the amount to which jurisdiction is given to the county courts by this act." It has been decided that no appeal lies in cases under 20*l.* By section 14 the amount is made the criterion of the appeal. Under section 17 cases as to title to lands or toll might by consent be brought before the county court judge; and clearly no appeal could lie in such a case. It is reasonable to suppose that it was not intended to give an appeal in cases as to money claims brought by consent before the County Court under the same section. The act means that the decision of the judge should be final in cases brought before him by consent.

[ALDERSON, B. Is not the jurisdiction given by the statute and the consent of parties, and not by the statute only?]

Quain, for the appellants. The court has jurisdiction to hear the appeal. This action is clearly one in which jurisdiction is given to the county court judge by the act. The act gives the jurisdiction,

¹ 23 Law J. Rep. (N. S.) Exch. 91; 9 Exch. Rep. 481. Before PARKE, B., ALDERSON, B., and MARTIN, B.

for it is a principle of law that consent of parties cannot give jurisdiction.

[PARKE, B. Unless the act of parliament says that they may.]

The jurisdiction is substantially given by the statute. This case, therefore, falls within the language of section 14, as "a cause of the amount to which jurisdiction is given to the county courts by this act." Whatever difficulty there may be in questions as to cases of title to land, that difficulty does not arise here. But even in those cases, if the parties agreed that the damages should exceed 20*l.*, the difficulty would be removed.

[PARKE, B. Whatever damages be given in cases of title to land, the decision of the county court judge must be final.]

By putting a narrow construction on the act the court would shut out an appeal in the most important class of cases.

[ALDERSON, B. If you treat the county court judge as an arbitrator, it is quite right that there should be no appeal from his decision. I think that section 17 is an arbitration section. If the case be one that requires the decision of a court of appeal, then it had better be brought in the Superior Court in the first instance.

PARKE, B. It is a very important question. We will speak to the judges of the other courts about it.]

Cur. adv. vult.

The judgment of the court was now delivered by —

PARKE, B. In this case, which was argued before my brothers Alderson and Martin, and myself, in the absence of the Lord Chief Baron, the court intimated that they would consult some of the other judges about it, on account of its general importance, before they delivered their opinion; but on speaking to some of the judges we found that they would rather not give any opinion, conclusively, upon this question, unless it had been argued before them, — and in that respect they are quite right. I have no reason to believe that at present there is any difference in their opinion from that which we are now about to pronounce; and I may add, that my Lord Chief Baron concurs in the opinion, I having intimated to him what our view of the case is. The question is, whether an appeal lies, by the 13 & 14 Vict. c. 61, against the decision of a county court judge in a cause amounting to above 50*l.*, and to a matter of 500*l.*, where jurisdiction is given to him by the voluntary agreement of the parties. The counsel for the respondent took the objection, after the case had been partly argued, that an appeal did not lie in this case; and we are clearly of opinion that an appeal does not lie. An appeal is given by the 14th section, which provides "that if either party, in any cause of the amount to which jurisdiction is given to the county courts by this act, shall be dissatisfied with the determination or direction of the said court in point of law," &c., he may be at liberty to appeal to the superior courts.

Now, jurisdiction in this case is not given by this act alone; and we are of opinion that the clause applies only to cases where juris-

 Smith v. Telt.

Decision is given to the county court judge by the act alone, that is, to causes of amounts above 20*l.* and not exceeding 50*l.*, and that a cause for a sum exceeding 50*l.* brought before the judge by the mutual agreement of the parties, under section 17, is not a cause in which an appeal lies. By that section parties may, by agreement, try before the county court judge actions for amounts exceeding 50*l.*, and also "any action in which the title to land, whether of freehold, copyhold, leasehold, or other tenure, or any title, toll, market, fair, or other franchise shall be in question." But it is perfectly clear that in no way of construing this act is an appeal given against a decision on any question of title to land by the county court judge; and there is no reason why an appeal should be allowed, where the parties give, by consent, jurisdiction to a judge in a matter of an amount exceeding 50*l.*, when it would not lie in a cause respecting title to land, toll, market, or fair, tried before him under the same section. Now if we look to the sense and reason of the thing, there is good ground for giving an appeal to one of the dissatisfied parties, where the jurisdiction is compulsory, and where they have no power to choose the judge, and the matter is of such an amount as would justify an appeal (and the legislature are of opinion, that matters of above 20*l.* and up to 50*l.* are of that description); but there is no reason why, if the parties agree themselves to leave it to the decision of the county court judge, they should not be bound by his decision, just as much as they would be bound if they had left the case to an arbitrator. We are of opinion, therefore, that comparing these sections together, the appeal does not lie in any case in which the parties have given, by voluntary agreement, jurisdiction to the county court judge. Consequently the appeal will be dismissed, but not with costs.

Appeal dismissed.

SMITH v. TELT.¹

January 16, 1854.

Ejectment — Mesne Profits — Common Law Procedure Act.

In ejectment by landlord against tenant, under 15 & 16 Vict. c. 76, s. 214, mesne profits may be recovered, although not specially claimed in the writ or issue.

EJECTMENT for premises held by the defendant, as tenant to the plaintiff. The writ and issue followed the forms given by the 15 & 16 Vict. c. 76, s. 214, neither of which contain any claim for mesne profits.

At the trial, before Platt, B., at the Middlesex Sittings in the pre-

¹ 23 Law J. Rep. (N. S.) Exch. 53; 9 Exchequer Rep. 307; 2 Com. Law Rep. 509.

Beavan v. M'Donnell.

sent term, the plaintiff sought to recover mesne profits up to the time of the verdict being given, which was allowed by the learned judge, and a verdict given accordingly.

Hawkins now moved for a rule *nisi* for a new trial, unless the plaintiff would alter the verdict by omitting the sum found for mesne profits. This question turns on the 15 & 16 Vict. c. 76, s. 214,¹ and it is submitted that the plaintiff is not entitled to recover the mesne profits in this action, because he has given the defendant no notice that he was proceeding for them. They should have been claimed either in the writ or issue.

*Per Curiam.*² The statute is express, that mesne profits may be recovered if notice of trial has been given. In fact, it is to be considered that a claim for mesne profits is included in all actions under this section.

Rule refused.

BEAVAN v. M'DONNELL.³

January 16, 1854.

Contract — Executed and Executory — Lunatic — Inability to understand — Bona Fides.

The plaintiff contracted for the purchase of an estate from the defendant, and paid a deposit on the terms that unless he objected to the title within a certain time, the same should be considered as accepted. No objection was made by him to the title. The plaintiff, at the time of the contract and of the payment of the deposit, was a lunatic, incapable of understanding the meaning of a contract, or of managing his affairs, and derived no benefit from the contract; but these facts were unknown to the defendant, who made the contract

. ¹ That section enacts, "Wherever it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant, that such tenant or his attorney hath been served with due notice of trial, the judge before whom such cause shall come on to be tried, shall, whether the defendant shall appear upon such trial or not, permit the claimant on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the writ in the ejectment, to go into evidence of the mesne profits thereof which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial finding for the claimant, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits; and in such case the landlord shall have judgment within the time hereinbefore provided, not only for the recovery and possession and costs, but also for the mesne profits found by the jury: Provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, or the day so specified therein, down to the day of the delivery of the possession of the premises recovered in the ejectment."

² PARKE, B., ALDERSON, B., and MARTIN, B.

³ 23 Law J. Rep. (N. S.) Exch. 94; 9 Exch. Rep. 309; 2 Com. Law Rep. 74.

Beavan v. M'Donnell.

with him fairly and *bonâ fide*, believing him capable of understanding the meaning of the same : —

Held, that the plaintiff was not entitled to recover the deposit, notwithstanding he was a lunatic incapable of contracting or of understanding the meaning of contracts.

THIS was an action for money had and received.

Plea — That the money was received from the plaintiff under a contract for the purchase of certain lands from the vendors thereof, on behalf of the defendant, on the terms that he should pay the sum of 415*l.* as a deposit; that the purchase should be completed by the 25th of March, 1852; that within four months after the contract the vendor should deliver an abstract of the title and deduce a good title thereto, and that within two months after the delivery of such abstract, the plaintiff should deliver to the vendor a statement of any objections to the title, and if no objections were so delivered the title should be considered as accepted; that on payment of the residue of the purchase-money, on the said 25th of March, 1852, the vendors would convey the premises to the plaintiff, and that if the plaintiff should fail to comply with these conditions his deposit should be forfeited to the vendors; that the plaintiff did pay to the vendors the sum of 415*l.*; that they then did receive the sum for the defendant and on his behalf, and within four weeks from the time of the contract, the vendors, on behalf of the defendant, did deliver to the plaintiff an abstract of title and deduce a good title thereto; and that more than two months after the time of the delivery and deducing of the said abstract and title elapsed without any statement of objections to the title being delivered to the said vendor; that the vendors on behalf of the defendant, thence until after the 25th of March, 1852, were ready and willing to convey the premises to the plaintiff on payment of the residue of the purchase-money, but the plaintiff did not complete the contract, but made default and did not complete the said purchase, and the said first-mentioned money became forfeited; that the defendant received and held the said money as aforesaid, and not otherwise.

Replication — That when he so contracted and from thence until a day after the said receipt by the defendant of the said money, he, the plaintiff, was lunatic and of unsound mind, and thereby incapable of contracting or of understanding the meaning of a contract, or of managing his affairs; and that the said contract was not of any use or benefit to him: of all which the defendant at the time of the said contract and of the said receipt of the said money had notice.

Rejoinder — That neither the vendors nor the defendant did, when the plaintiff made the said contract of sale or paid the money therein mentioned, know that he was a person lunatic or of unsound mind, and incapable by reason of such unsoundness of understanding the meaning of a contract, but made the said contract with him fairly and in good faith, believing that he was able to understand the meaning of the same. Demurrer.

Skinner, for the plaintiff, in support of the demurrer. The plaintiff is entitled to judgment. *Molton v. Camroux*, 2 Exch. Rep. 487;

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and affirmed in error, 4 Exch. Rep. 17, applies to this case, and contains all the authorities applicable to this point. The argument there used on behalf of the plaintiff may be used in this case. The court there say, "We are not disposed to lay down so general a proposition as that all executed contracts *bonâ fide* entered into must be taken as valid, though one of the parties be of unsound mind; we think, however, we may safely conclude that when a person comparatively of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bonâ fide*, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed and cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside either by the alleged lunatic or those who represent him; and this is the present case, for it is the purchase of an annuity which has ceased." The language of that judgment does not apply to all contracts. For instance, if an executed contract were made with a lunatic, and it can be rescinded without damage to either side, and the parties can be placed *in statu quo*, the lunatic would not necessarily be bound by such a contract. But this case is not altogether governed by *Molton v. Camroux*, because here the contract was executory merely, the paying of the deposit being only a preliminary. He cited *Hall v. Warren*, 9 Ves. 605.

Willes, contra, for the defendant. One of the cases cited by the other side has no application, and the other is distinguishable. In the cases that have been decided in equity, the courts exercise a discretion, as the party has his remedy by bill for specific performance. The doctrine of *potior est conditio defendentis* applies to this case. But the main distinction between this case and the others that have been referred to is, that this is not the case of an executory but an executed contract. The decision of the Court of Error goes beyond that of the Court of Exchequer, especially in regard to the lunacy not being known to the party contracting with the lunatic, and the contract being executed in any respect. The rule applicable to this case is, that which has been done cannot be undone; and here the keeping of the money formed the end of the transaction. He referred to *Price v. Berrington*, 7 Hare, 394.

Skinner replied.

Cur. adv. vult.

The judgment of the court was now delivered by —

PARKE, B. [After stating the pleadings, his lordship proceeded] — The question is whether the present case falls within the principle of *Molton v. Camroux*, and we think that it does. It will be observed that the replication in this case states an additional fact, the absence of which occasioned the remark by Mr. Justice Patteson, in giving the judgment of the Court of Error. The special verdict in that case stated, that the intestate was, at the time of the contract, a lunatic

 Truscott v. Lautour.

and of unsound mind, so as to be incapable to manage his affairs. Mr. Justice Patteson observed, "that did not show such a state of mind in the grantee as to render him necessarily incapable of knowing the nature of his acts." The replication supplies this supposed defect, by averring that the plaintiff was a lunatic and of unsound mind, and thereby incapable of contracting, or of understanding the meaning of contracts, and the statement is, in other respects, the same as that of the special verdict in this case. We think this makes no difference between the present case and that already decided, and we are further of opinion that this falls within the principle of that case. This action was not brought on an executory contract. The plaintiff is seeking to recover back a sum of money paid to the defendant on a contract, which the defendant has performed, and according to which he is entitled to retain it. The contract was entered into by the defendant, and the money received fairly and in good faith, and without knowledge of lunacy, and being a transaction completely executed, as far as the deposit is concerned, the defendant has done all he is bound to do to make that his own. The plaintiff has had all he bargained for, the power of buying the estate and a title established in a given time on payment of the residue of the purchase-money. The case is in substance the same as if the plaintiff had paid to the defendant a sum of money down, to abide the event of his performing a certain piece of work in a certain time; and if the defendant has done this stipulated work the money is now his own, and the plaintiff cannot recover it back.

Judgment for the defendant.

TRUSCOTT v. LAUTOUR.¹

January 31, 1854.

Practice — Common Law Procedure Act — Notice to bring Cause to Trial — Insolvency.

Where a defendant, who was in prison, had stated that he intended to go through the Insolvent Court, and that he had made up his mind not to pay anybody, and afterwards, pursuant to the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 101, served the plaintiff with a twenty days' notice to bring the cause on for trial, the court set aside the notice.

This was a rule calling on the defendant to show cause why a twenty days' notice, given by him to the plaintiff, to bring the cause on to be tried, and any suggestion entered thereon, should not be set aside, with costs; or why a *stet processus* should not be entered; or why the time for proceeding to trial should not be extended.

¹ 23 Law J. Rep. (N. S.) Exch. 96; 18 Jur. 134; 9 Exch. Rep. 420.

In re Dearden.

The notice had been given under the 101st section of the Common Law Procedure Act, 15 & 16 Vict. c. 76;¹ it was dated the 20th of December, 1853, and required the plaintiff to bring the cause on to be tried at the first sittings in London in Hilary term, 1854. The affidavit on which the rule was obtained stated that the defendant was in prison for debt, and had stated to the plaintiff that since he, the plaintiff, had chosen to commence proceedings, he, the defendant, had changed his mind as to payment, and intended to proceed through the Insolvent Court, and also had made up his mind not to pay any thing to anybody.

Wordsworth, for the defendant, now showed cause. The plaintiff has not shown sufficient cause for not proceeding to trial.

The Court² suggested a *stet processus*, which being declined by *Wordsworth*, the court, without calling on *Pearson*, made the rule absolute.

Rule absolute.

*In Re DEARDEN.*³

November 8, 1854.

Attorney—Taxation of Bill.

The court will not lay down any fixed rule as to the special circumstances under which an attorney's bill may be ordered to be taxed after payment. Stat. 6 & 7 Vict. c. 73, s. 41, should be construed liberally.

Where A paid an attorney's bill in order to get possession of papers withheld from him until payment, and the payment was made without prejudice to the right of taxation, the amount of the bill not appearing, the court would not rescind an order to tax made by a judge at chambers.

This was an application for a rule to rescind an order of Martin, B., ordering an attorney's bill to be taxed after payment.

¹ That section enacts, "When any issue is or shall be joined in any cause, and the plaintiff has neglected, or shall neglect, to bring such issue on to be tried, that is to say, &c., the defendant may give twenty days' notice to the plaintiff to bring the issue on to be tried at the sittings or the assizes, as the case may be, next after the expiration of the notice; and if the plaintiff afterwards neglects to give notice of trial for such sittings or assizes, or to proceed to trial in pursuance of the said notice given by the defendant, the defendant may suggest on the record that the plaintiff has failed to proceed to trial, although duly required so to do, (which suggestion shall not be traversable, but only be subject to be set aside if untrue,) and may sign judgment for his costs; provided, that the court or a judge shall have power to extend the time for proceeding to trial with or without terms."

² POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

³ 2 Com. Law Rep. 808; 17 Jur. 993; 23 Law. J. Rep. (N. S.) Exch. 14. Before POLLOCK, C. B., PARKE, B., PLATT, B., and MARTIN, B.

In re Dearden.

The affidavits showed that Dearden had formerly been employed by one Smith to do certain business as an attorney. Smith had afterwards withdrawn his business from Dearden, and employed one Hodgson, who, pursuant to his retainer, applied to Dearden, requiring him to give up certain papers, the property of Smith. Dearden refused to give them up unless his bill was first paid. No time was allowed to get the bill taxed, but the amount was paid; Hodgson saying at the time that it was paid without prejudice to the rights of taxation, to which no answer was given. The amount of the bill did not appear from the affidavits.

Hugh Hill. By 6 & 7 Vict. c. 73, s. 41,¹ an attorney's bill can only be ordered to be taxed after payment under "special circumstances," and there are not such special circumstances here as will justify the court in making any such order. There are no cases in the common law courts applicable to this case, but there are decisions of the courts of equity, which lay it down as a rule that both pressure and overcharge, and not one or the other only, are necessary to exist together to satisfy the court that the bill should be taxed. *In re Colquhoun*, 9 Beav. 146; *Re Harrison*, 10 Beav. 57; *Re Neate*, 10 Beav. 181; *Re Harding*, 10 Beav. 250; *Re Stirke*, 11 Beav. 304; *Re Welchman*, 11 Beav. 319; *Ex parte Barton*, 1 Eq. Rep. 109; s. c. 19 Eng. Rep. 497.

POLLOCK, C. B. There should be no rule in this case. My brother Martin, sitting at chambers, was a proper judge of the special circumstances under which the application was made, and as to whether they constituted a cause for the taxing of the bill. This motion comes before us on appeal, and the amount of the bill is not given. If a judge at chambers decides upon such a case as this, we ought not to interfere at a cost to the parties of 15*l.*, as the master informs us, for a bill, the amount of which may be only a few pounds. I dissent from the decisions cited from the courts of equity, and from the principle to be gathered from them. Whenever it is possible, a rule should be laid down that the principle should be known by the profession and the public, and applied to the facts of each case. But here, the question of what special circumstances will justify the interference of the court should be left open, that when matters arise they may be disposed of with reference to the circumstances peculiar to each. On the facts of the case, as stated in the affidavits, the bill should be looked into by the master, that justice may be done between the parties. We cannot allow expense to be incurred in arguing the rule, unless it appears that the subject-matter is worthy of the cost.

¹ Sect. 41 enacts, "That the payment of any such bill as aforesaid shall in no case preclude the court or judge, to whom application shall be made, from referring such bill for taxation, if the special circumstances of the case shall, in the opinion of such court or judge, appear to require the same, upon such terms and conditions, and subject to such directions, as to such court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment."

Glover v. Dixon.

PARKE, B. I concur in thinking that the rule should be refused on the ground that the amount of the bill is concealed from us. I by no means think it clear that my brother Martin was wrong. The decisions in the courts of equity disclose too narrow a rule, and I think the interests of justice require a larger construction of the rule. I dissent from the principle laid down in *In re Harding*.

PLATT, B. The authorities cited from the courts of equity are worthy of attention. There are, however, no decisions in courts of law applicable to the matter, and we must apply the law as in our discretion we think best. Here the payment of the bill is extorted, the money is paid under protest, and the person receiving it knows that it is to be taxed.

MARTIN, B. I am of the same opinion. I do not agree with the decision in *In re Harding*, and should decide as I have already done, if this matter came before me as the facts appear on the present application.

Rule refused

GLOVER v. DIXON and another.¹

November 8, 1853.

Pleading—Special Replication.

Matter which before the statute 15 & 16 Vict. c. 76, ss. 77, 79, was the subject of a special replication, is not put in issue by the general traverse given by these sections. Trespass q. c. f., plea justifying under a right to dig soil. Replication,—"And the plaintiff joins issue on the plea":—

Held, that the right only was put in issue, and that trespasses, extra the right, should have been new assigned.

TRESPASS, *quare clausum fregit*. Plea, among others, to the effect that the defendants had a right to dig soil, and having occasion to exercise that right, did, in consequence, commit the alleged trespasses, doing no unnecessary damage.

Replication—"And the plaintiff joins issue on each of the pleas."

The action was tried before Lord Campbell, C. J., at the last Chester Assizes, when it was proved by the defendants that they had the right to dig soil, as alleged in their plea, but they did not show that the trespasses complained of were done in exercise of that right. The learned judge was of opinion that it did not lie on the defendants to show that they had duly exercised the right set up, and that the plaintiff ought to have new assigned trespasses on the *locus in quo* other than those covered by the due exercise of the right, if he wished to question that

¹ 2 Com. Law Rep. 309; 17 Jur. 1012; 23 Law J. Rep. (N. S.) Exch. 12. Before POLLOCK, C. B., PARKE, B., PLATT, B., and MARTIN, B.

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matter; and directed a verdict for the defendants on the issue raised by the plea above referred to.

W. R. Grove now moved for a new trial, on the ground of misdirection. The replication is a general traverse of the plea under 15 & 16 Vict. c. 76, ss. 77, 79.¹ Such a traverse as this puts in issue all material facts; and it is in this case a material fact, that the trespasses were done in pursuance of the right. As the pleadings now stand, the defendants should have shown that the trespass on the land was in exercise of the right. It is in this case as in the case of leave and license; where that is pleaded, the defendant must prove that the leave and license is coextensive with the trespass committed.

Per Curiam. The general replication given by the statute is in the nature of a replication *de injuriâ*, but it cannot dispense with the necessity of replying specially, where that was necessary before the passing of the act. The statutable general replication is not sufficient, and the plaintiff ought to have new assigned.

Rule refused.

AUSTIN v. MILLS.²

December 8, 1853.

Judgment — County Court — Consideration — Action.

The decision of the Court of Queen's Bench, in *Berkeley v. Elderkin*, 1 El. & Bl. 805; s. c. 18 Eng. Rep. 377, that an action cannot be maintained in a superior court on a judgment obtained in a county court constituted under the 9 & 10 Vict. c. 95, ought to be followed by courts of coördinate jurisdiction with the Queen's Bench.

An action cannot be maintained for the cause of action in respect of which judgment has been recovered in such a county court.

¹ Sect. 77 enacts, "A plaintiff shall be at liberty to traverse the whole of any plea or subsequent pleading of the defendant by the general denial; or, admitting some part or parts thereof, to deny all the rest, or to deny any one or more allegations."

Sect. 79 enacts, "Either party may plead, in answer to the plea or subsequent pleading of his adversary, that he joins issue thereon, which joinder of issue may be as follows, or to the like effect:—

'The plaintiff joins issue upon the defendant's first (&c., specifying what or what part) plea:

'The defendant joins issue upon the plaintiff's replication to the first (&c., specifying what) plea:'

And such form of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleading, and an issue thereon," &c.

² 18 Jur. 16; 23 Law J. Rep. (n. s.) Exch. 40.

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THE first count of the declaration was on a judgment obtained in a county court constituted under the 9 & 10 Vict. c. 95; and the second was for the cause of action on which that judgment had been obtained. To the second count, the defendant pleaded a plea of judgment recovered on proceedings in the county court, to which plea the plaintiff demurred; and the defendant having joined in demurrer, the whole case was argued during the term, on the 16th November, before Pollock, C. B., Parke, Alderson, and Platt, BB.

Unthank, for the plaintiff. There are two questions in this case: first, whether an action will lie on a judgment obtained in a county court constituted under the 9 & 10 Vict. c. 95; and, secondly, whether an action can be maintained on the consideration for that judgment.

[POLLOCK, C. B. Has not the first point been decided in the negative by the Court of Queen's Bench in *Berkeley v. Elderkin*, 1 H. & Bl. 805; s. c. 18 Eng. Rep. 377?]

The principle laid down in that case is new and altogether indefensible, it being an established principle of law that every sort of judgment of a court of record, and even every award, may be enforced by action. Moreover, the reasons given by the Queen's Bench for their judgment in that case will not bear examination. One is, that the judgments of county courts have only a limited effect as regards execution; but the same might be said of the judgments in the old county courts, (Com. Dig. "County," C.10, 13,) on which actions certainly lay, (*Williams v. Jones*, 13 M. & W. 628,) and of all other courts of limited jurisdiction; as well as of all foreign courts, where there can be no execution. The next reason given is founded on section 100 of the statute, which enacts that "it shall be lawful for the judge of any court before whom such summons shall be heard, if he shall think fit, whether or not he shall make any order for the committal of the defendant, to rescind or alter any order that shall have been previously made against any defendants so summoned before him for the payment, by instalments or otherwise, of any debt or damages recovered, and to make any further or other order either for the payment of the whole of such debt or damages and costs forthwith, or by any instalments, or in any other manner, as such judge may think reasonable and just:" and by sect. 105, "If it shall at any time appear to the satisfaction of the judge, by the oath or affirmation of any person or otherwise, that any defendant is unable, from sickness or other sufficient cause, to pay and discharge the debt or damages recovered against him, or any instalment thereof ordered to be paid as aforesaid, it shall be lawful for the judge, in his discretion to suspend or stay any judgment, order, or execution given, made, or issued in such action, for such time and on such terms as the judge shall think fit, and so from time to time, until it shall appear, by the like proof as aforesaid, that such temporary cause of disability has ceased;" whereas final judgments of the superior courts cannot be altered. It may, indeed, be conceded that no action could be maintained on a judgment payable by instalments until all the instalments were due; but there is no allegation here that the judgment sued on

was payable by instalments, and that is a fact which cannot be assumed. If, after an action brought on the judgment of a county court, the judgment should be varied by order of that court, the fact should be pleaded as matter arising *puis darrein continuance*. But the 100th section is, in truth, a remedy given to the suitor to hasten the judgment, not to give time to the adversary. This appears from the 98th and 99th sections, which enable him to bring the defendant before the court to be examined respecting his means of payment. As to the second point, there is a great difference between the judgments of the ordinary courts of record and of courts like the present county courts. The former bar all other remedies for the debts for which they were brought, on the principle that the judgment gives a higher remedy than any other. *Lord Bagot v. Williams*, 3 B. & Cr. 235, and other cases. Besides, their proceedings may be reviewed by writ of error. Now, although the county courts established by this statute are courts of record, (9 & 10 Vict. c. 95, ss. 3, 111,) it is not in the same sense as the courts at Westminster. Thus it has been held that they are not courts of record to which writs of trial may be directed. *Breese v. Owens*, 6 Exch. 413; s. c. 3 Eng. Rep. 589. No action will lie on any interlocutory order. *Fry v. Malcolm*, 4 Taunt. 705; *Biddell v. Dowse*, 6 B. & Cr. 255. Nor upon the decree of a court of equity. *Carpenter v. Thornthorn*, 3 B. & Al. 52. And Lord Campbell, C. J., in delivering his judgment in *Berkeley v. Elderkin*, says, "An action can be maintained on a final judgment only, not on an interlocutory one." Having read the 100th section he proceeds thus: "This shows that there is nothing in the nature of a final judgment in the county court. The judge has still jurisdiction over this very judgment on which the action is brought. He might now rescind or alter it, and make a new order to pay by instalments or at another time. That power given to the judge would be defeated if the action lay." He also cited *Level v. Hall*, Cro. Jac. 284, and *Plummer v. Woodburne*, 4 B. & Cr. 625.

T. Jones, contra. This court, being only of coördinate jurisdiction with the Queen's Bench, will not overrule *Berkeley v. Elderkin*, even if they think it wrongly decided. All the reasons given for that judgment may not be satisfactory; but there is one which is amply sufficient to support it, namely, that actions like the present are contrary to the general scope and spirit of the County Court Act. The 89th section enacts, that "every order and judgment of any court holden under this act, except as herein provided, shall be final and conclusive between the parties, but the judge shall have power to nonsuit the plaintiff in every case in which satisfactory proof shall not be given to him, entitling either the plaintiff or defendant to the judgment of the court, and shall also in every case whatever have the power, if he shall think fit, to order a new trial to be had on such terms as he shall think reasonable, and in the meantime to stay the proceedings." When the Queen's Bench say the judgments of county courts are not final, the expression must not be understood in the sense of final as opposed to interlocutory. Then the above reason for the decision of the Queen's Bench is even more decisive on the second point. Where

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a man has elected his tribunal he must abide by it—"Nemo debet pro una causa bis vexari."

Unthank, in reply. Admitting the principle that no tribunal ought to overrule the decision of another of coördinate jurisdiction, it cannot apply to a case like the present, where there are two inconsistent counts, the upholding either of which necessarily overrules the decision of the other court. The expression "final and conclusive," in the 89th section of the County Court Act, means final and conclusive in that court. A judgment is not final if the court can alter it, which the county court is empowered to do by the other sections.

Cur. adv. vult.

The judgment of the court was now delivered by

POLLOCK, C. B. Two questions arise on the pleadings in this case—the first, whether an action will lie in the superior courts on a judgment obtained in a county court; the second, whether such a judgment may be pleaded in bar to an action for the original debt for which the judgment was obtained.

As to the first question, the court have already intimated that they should consider the case in the Court of Queen's Bench, of *Berkeley v. Elderkin*, 1 El. & Bl. 805, s. c. 18 Eng. Rep. 377, which is precisely in point, as an authority on which they ought to act in the first instance, unless it appeared to be clearly their duty to take a different view. The utmost that has been done by the argument for the plaintiff is to raise some doubt, and we think that doubt must be solved in a court of error.

It is then contended that the judgment in the county court is no bar to an action for the original consideration. It was not disputed that a final judgment in an inferior court for any cause of action is a bar to a suit in any other court for the same cause, but it was argued that the judgment of the county court was not final, and therefore no bar to such a suit, because it was competent for the county court judge to vary it afterwards, by virtue of the 100th section of the 9 & 10 Vict. c. 95. Expressions in the close of Lord Campbell's judgment, in *Berkeley v. Elderkin*, to that effect were made use of on the argument before us, to show that his lordship was of that opinion. But we think that the expressions of Lord Campbell have been mistaken. We do not understand his lordship to mean that the judgment was not final, in the sense that it was in the nature of an interlocutory judgment. We think it is a final and complete decision of the case in the county court, and consequently that the question whether the debt recovered was due cannot be again litigated in any other court. The power given by that section does not seem to us to be a power to vary the judgment, but only in effect to regulate the execution on it; and the judgment appears to us to be final and complete, and by no means in the nature of an interlocutory judgment; and is consequently a bar.

We therefore think that the judgment on the whole record must be for the defendant.

Judgment for the defendant.

 Eastern Union Railway Co. v. Cochrane.

THE EASTERN UNION RAILWAY COMPANY v. COCHRANE.¹

November 16, 1853.

Railway Company — Amalgamation — Surety.

Two railway companies were amalgamated by an act of parliament, which contained, *inter alia*, a clause that "from and immediately after, &c., all the moneys, goods, chattels, steam and other engines, carriages, wagons, trucks, machines, live and dead stock, shares, bonds, deeds, securities, books, writings, maps, plans, and other personal estate and effects of or to which the dissolved companies, or either of them, were possessed or entitled at law or in equity immediately before the granting thereof, shall be vested in and belong to the new company for their absolute benefit; and all persons and corporations who, immediately before the granting of such certificate, owed any sum of money to the dissolved companies, or either of them, or to any person on behalf of the dissolved companies, or either of them, shall, after the granting thereof, pay the same, together with all interest, if any, due, or to accrue due for the same, to the new company, and all the rights and remedies for enforcing payment thereof which before the granting of such certificate belonged to the dissolved companies, or either of them, shall, immediately after the granting thereof, devolve upon and be vested in the new company, and all moneys which, immediately before the granting of such certificate, were due and owing by or recoverable from the dissolved companies, or either of them, or for the payment of which they, or either of them, were or but for the granting of such certificate would have been liable, shall be paid, with all interest, if any, due and to accrue due thereon, by or be recoverable from the new company; and all conveyances, contracts, agreements, mortgages, bonds, covenants, and securities made or entered into before the granting of such certificate, to, with, in favor of, or by or for the dissolved companies, or either of them, or any person duly authorized on their behalf, shall, immediately after the granting of such certificate, be and remain as good, valid, and effectual, in favor of, and against, and with reference to the new company, and may be proceeded on and enforced in the same manner to all intents and purposes, as if the last-mentioned company had been a party to and executed the same, or had been named or referred to therein, instead of the persons, company, or party actually named therein respectively." Before the amalgamation, A had become security by bond to one of the companies for the conduct of B, whom they had taken into their employ. B having continued in the service of the amalgamated company:—

Held, that A was liable to them for breaches of the bond committed after the amalgamation.

THE declaration alleged, that after the passing of a certain act of parliament for making a railway from Colchester to Ipswich, and before the passing of a certain act of parliament to amalgamate the Eastern Union and the Ipswich and Bury St. Edmund's Railway Companies, the defendant, by his writing obligatory, sealed with his seal, acknowledged himself to be held and firmly bound to the Eastern Union Railway Company, being the company incorporated by the first-mentioned act of parliament, in the sum of 200*l.*, which said writing obligatory was subject to a certain condition thereunder written, whereby, after reciting that one Henry Pearson Coles had been taken into the employment of the last-mentioned company, it was declared, that if he should from time to time, and at all times thereafter, so long as he should continue in the service of that company, well and truly observe and perform all the rules, regulations, orders, and directions of the directors or secretary thereof for the time being, &c., and should diligently, faithfully, and honestly conduct and employ

¹ 17 Jur. 1103; 23 Law J. Rep. (N. S.) Excn. 61.

himself in and about the business of the company, and should from time to time, when thereunto required by the directors or the secretary, &c., deliver unto them or him a true and faithful account in writing of all moneys, notes, bills, securities for money, orders, papers, writings, letters, and other things which he had been or should be intrusted with by the company, or which had come or should come to his hands on account and for the use of the company; and also should from time to time, and at all times thereafter, pay over and deliver to the directors, or to such person or persons as they should appoint in that behalf, all moneys, bills, notes, &c., whatsoever which had already come or should thereafter come to his hands or possession for or on account or for the use of the company, and which should not have been previously duly made good or accounted for by him; and also that if the defendant and one George Ellis should save harmless and keep indemnified the last-mentioned company from and against all losses, costs, charges, damages, and expenses which might arise or happen, or be incurred or sustained by the last-mentioned company, by reason of any fraud, deceit, concealment, neglect, carelessness, or improper conduct of the said Henry Pearson Coles, or of any other act or thing whatsoever to be done, committed, or omitted by him in and during his said service, or which by ordinary and proper care, diligence, and attention might have been prevented or provided against, or which should be contrary to the duty of the said Henry Pearson Coles in his employment as aforesaid, or which might happen by his conniving at or sanctioning any unlawful act contrary to his duty as aforesaid, then the bond or obligation should be void and of none effect, otherwise to be and remain in full force and virtue. It further alleged, that after the passing of the second-mentioned statute, the Commissioners of Railways, under their seal, in the manner mentioned in that act, granted the certificate thereby required for the dissolution of the companies therein called "The Dissolved Companies," and for the incorporation of the company therein called "The New Company," whereupon and whereby the said new company became incorporated, and that the plaintiffs were that company. The declaration then proceeded to state that the said Henry Pearson Coles continued in the service of the company to which the bond was given until the same was dissolved, and from thence continued in the service of the plaintiffs for a long time under the contract by which he was, as recited in the said condition, taken into the employment of the company therein mentioned, and assigned several breaches of the said condition alleged to have been committed while Henry Pearson Coles so continued in the service of the plaintiffs.

The 10 & 11 Vict. c. 174, after reciting the 7 & 8 Vict. c. 85, for making a railway from Colchester to Ipswich, and two subsequent acts to amend it—the 8 & 9 Vict. c. 97, for the formation of the Ipswich and Bury St. Edmund's Railway Company, and the 9 & 10 Vict. c. 280, to amend it, and for making a railway from that railway to Norwich, with a branch therefrom—enacted in its 1st section, that after the Commissioners of Railways should have granted a certificate to a certain effect, those companies should be

dissolved, and a new company incorporated by the title of "The Eastern Union Railway Company."

Sect. 6. "The dissolution of the said companies, and the repeal of so much of the said several recited acts as may under the powers and provisions of this said act be or become repealed, shall not be held to invalidate or in anywise prejudice or affect any act of either of the dissolved companies done before the granting of the said certificate, or any liability, debt, contract, agreement, purchase, sale, conveyance, grant, mortgage, bond, instrument or engagement, act, matter, or thing whatsoever heretofore made, done, committed, executed, or entered into, by, with, in favor of, or for either of the dissolved companies, but every such liability, debt, contract, agreement, purchase, &c. shall be as good, valid, and effectual, to all intents and purposes, in favor of or against the new company, as they would have been in favor of or against either of the dissolved companies if such company had not been dissolved."

Sect. 10. "From and immediately after the granting of the said certificate, all the moneys, goods, chattels, steam and other engines, carriages, wagons, trucks, machines, live and dead stock, shares, bonds, deeds, securities, books, writings, maps, plans, and other personal estate and effects of or to which the dissolved companies, or either of them, were possessed or entitled at law or in equity immediately before the granting thereof, shall be vested in and belong to the new company for their absolute benefit; and all persons and corporations who immediately before the granting of such certificate owed any sum of money to the dissolved companies or either of them, or to any person on behalf of the dissolved companies or either of them, shall after the granting thereof pay the same, together with all interest, if any, due or to accrue due for the same to the new company, and all the rights and remedies for enforcing payment thereof which before the granting of such certificate belonged to the dissolved companies, or either of them, shall immediately after the granting thereof devolve upon and be vested in the new company, and all moneys which immediately before the granting of such certificate were due and owing by or recoverable from the dissolved companies or either of them, or for the payment of which they or either of them were, or but for the granting of such certificate would have been liable, shall be paid, with all interest, if any due and to accrue due thereon, by or be recoverable from the new company; and all conveyances, contracts, agreements, mortgages, bonds, covenants, and securities made or entered into before the granting of such certificate, to, with, in favor of, or by or for the dissolved companies or either of them, or any person duly authorised on their behalf, shall immediately after the granting of such certificate be and remain as good, valid, and effectual, in favor of, and against, and with reference to the new company, and may be proceeded on and enforced in the same manner, to all intents and purposes, as if the last-mentioned company had been a party to and executed the same, or had been named or referred to therein, instead of the persons, company, or party actually named therein respectively."

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Sect. 14. "Every clerk, agent, collector, and other officer who at or immediately before the granting of the said certificate was in the service of either of the dissolved companies, shall immediately after the granting of the said certificate hold and enjoy his office, and employment, together with the salary and emoluments thereunto annexed, until he shall be removed therefrom by the new company; and every such clerk, agent, collector, and officer shall have the like powers and authorities, and shall be subject and liable to the like pains and penalties, and to the like power of removal, and to the like rules and regulations in all respects whatsoever, as if he had been appointed by the new company after the granting of the said certificate."

To this declaration the defendant demurred.

O'Malley, for the defendant. The question raised by the declaration in this case depends on the construction of stat. 10 & 11 Vict. c. 174. The defendant became surety by bond to a railway company for the conduct of a certain party whom they took into their employ, subsequently to which the company was dissolved by act of parliament and incorporated with another, and the amalgamated company now seek to render the defendant liable for a default of the party committed after the amalgamation. The new company are entitled to sue for breaches of the bond committed against the old company; but to allow them to sue for any committed after it was dissolved would be a great injustice to the obligee of the bond, which was not made with the plaintiffs, but with a different party for a different purpose. If the legislature meant so strong a thing they should have so expressed themselves; and if they even had, this Amalgamation Act was passed behind the back of the defendant, whom it is sought to affect by it.

[ALDERSON, B. How could they have expressed themselves more strongly to that effect than they have done?]

They could have put a special provision in the 14th section, which seems the natural place for it. The language of acts of parliament may be modified when the not doing so would lead to injustice. *Stracey v. Nelson*, 12 M. & W. 535. And many cases might be put to show that the words of this 10th section cannot be understood as of universal application. Suppose, for instance, the old company had contracted to sell all its spare land to a vendee, would that bind the new company? Again, here is a change of masters and a change of duty, for the line and traffic are considerably increased by the amalgamation.

[PARKE, B. Suppose a clerk bound to an East India merchant, if he afterwards extends his trade to the West Indies is the clerk discharged from his service?]

Moreover persons who enter into engagements of this kind commonly take a counter security from the friends of the party for whom they are bound; in which counter security the nature of the service being specified, it would become void on a change of the service.

[ALDERSON, B. When the parties knew of the clause in the statute—and we must presume everybody knew it—they could have taken a fresh counter security.]

PARKE, B. Does not *The London and Brighton Railway Company v. Goodwin*, 3 Exch. 320, settle this point?]

No; the breaches there were breaches in the time of the old company.

Bramwell, contra. This question is to be decided by the meaning of the instrument sued on, and not by consideration of any supposed hardships.

[ALDERSON, B. The rule in construing statutes is to take the words in their natural sense, unless the doing so leads to some absurdity.]

The effect of this statute is to substitute the new company for the old in all matters relating to debts, contracts, and rights of action. The case of spare land may or may not be different; but if hardship is to be taken into consideration, there would be some in compelling every person who has a bond of this nature to get it renewed and pay for a fresh stamp. If the opposite construction is to prevail, a clerk whose duty it is to look over the whole line, might contend he was only bound to overlook a number of miles equal to the length of the old railway; and the bookkeeper might contend that he was not bound to book passengers for a greater distance. [He was then stopped.]

O'Malley, in reply. Suppose the old company under a contract to buy all their engines of a certain person for a given number of years, would that contract, on the amalgamation of the companies, expand itself into a contract by that party to supply the whole of the increased line?

POLLOCK, C. B. Our judgment must be for the plaintiffs. The question turns entirely on the meaning of the 10th section of stat. 10 & 11 Vict. c. 174, which says, that all the securities of the old company are to be vested in the new; and the question is, whether, when it is proposed to put in force a surety of the old company in favor of the new, that may be done, or whether the hardship suggested by Mr. O'Malley deprives the statute of that which is its plain and manifest meaning. I think we are bound by the language, which clearly means what is contended for by Mr. Bramwell, and I have not the least doubt either as to the meaning of that language, or what the legislature intended it should mean. The words were used for the plain purpose of doing what Mr. O'Malley says is a hardship. It is impossible to avoid the effect of the question put by my brother Alderson in the course of the argument—if the legislature had intended so to express themselves, in what other language could the clause have been framed, or what other language could have been used to leave as little doubt on their meaning as the present?

Eastern Union Railway Co. v. Cochrane.

PARKE B. I am of the same opinion. The rule of construction alluded to by my brother Alderson, in the course of the argument, is now fully established, namely, that you must read the clauses in a statute according to their plain meaning, unless the doing so leads to manifest inconvenience, to be collected from the other parts of the statute, in which event the words may be modified so as to remove that inconvenience, and no farther. Now apply that rule to this 10th section. According to the true construction of it, the former part having applied to bonds, &c. already forfeited, the second applies to those securities which have an effect almost, though not quite, as strong in making persons responsible to the old company, and the effect throughout is the same as if in describing the company in the bond the name of the Eastern Union Railway Company had been inserted instead of the Ipswich Railway Company, in which case the condition would have been, that all the clerks and their servants should account with the Union Railway Company. Mr. O'Malley says that is an injustice against the surety; but I apprehend that practically it would not have the least effect as such; for every person who was clerk at a station would remain at the same station, and would not be accountable for larger sums arising from the increase of traffic consequent upon the union. Cases have indeed been put in which it would be difficult to construe this section so as to make certain contracts of the old company valid with the new. Such is the contract to supply iron rails, which no doubt would be modified, so as to render the contract by which the united company was bound good for only so many rails as would have been required by the old company. We might there so far modify the sense of the language of the section, for it would be absurd to say that a party was bound to supply all the rails that might be required by the two united companies, when by his agreement he was only bound to supply one. I therefore think the words of this section clearly do not work any injustice. The same point was before the Court in *The London and Brighton Railway Company v. Goodwin*, 3 Exch. 320; in which case my impression was much the same as now, but as according to the bond there the clerk was to account to and be employed in the business of the three amalgamated companies, it was not necessary to go so far as the present case. After much attention to Mr. O'Malley's argument, I agree with my Lord that this 10th section extends to this case.

ALDERSON and PLATT, BB., concurred.

Judgment for the plaintiffs.

Mucklow v. Whitehead. Openshaw v. The Same.

MUCKLOW v. WHITEHEAD. OPENSHAW v. The Same.¹

January 19, 1854.

Costs, Taxation of — Attorney in Two Actions against same Defendant — Costs of Briefs.

Two plaintiffs brought separate actions and recovered damages against the same defendant, in respect of a distinct injury sustained by each of them from the same cause. The same attorney was employed by both plaintiffs, and the briefs in each case were to a certain extent similar. The master, in taxing the plaintiff's costs, treated those portions of the briefs in each action which were similar, as a brief and a draft brief, and taxed the costs accordingly. He then added together the costs of such brief and of the draft, and allowed half the aggregate amount to each plaintiff: —

Held, that the taxation was wrong, it not being the duty of the master to take into consideration that the same attorney was employed by two parties, unless the actions had been consolidated.

THESE were rules calling on the defendant to show cause why the master should not review his taxation of the plaintiff's costs, under the following circumstances.

At the Liverpool Spring Assizes for 1853, the plaintiff Mucklow, who was a manufacturing chemist and drug-grinder, brought an action against the defendant to recover compensation in damages for an injury sustained by the bursting of a large reservoir of the defendant, whereby the plaintiff's drugs were damaged and destroyed. At the same assizes, another action was brought by the Messrs. Openshaw, who were cotton-spinners, against the same defendant, in respect of the bursting of the same boiler. In the former case, the jury found for the plaintiff, damages 3,250*l.*; and in the latter, the sum of 500*l.* Separate witnesses were called to prove the amount of injury in each action, and the same attorneys were employed in each case. The briefs in the two actions were to a certain extent similar, and the master in taxing the costs acted upon this principle; all those portions of the briefs, in each action, which were similar he treated as brief and a draft brief, and taxed the costs accordingly. He then added together the costs of such brief and draft, and allowed half of the aggregate amount to each plaintiff.

J. Gray, showed cause. The master was right in the view he took. He allowed for one brief only, considering that the brief in the second action was a mere copy of the first, and required no skill or labor in the drawing.

[ALDERSON, B. Suppose an attorney draws a brief for one client, and the cause is tried at the Spring Assizes, and afterwards draws a brief, which is a copy of the former, and the second action is tried at the Summer Assizes, is he not entitled to charge his client for drawing the second brief? If he is not, he had better burn the first brief.]

¹ 23 Law J. Rep. (N. S.) Exch. 97; 9 Exch. Rep. 380; 2 Com. Law Rep. 553.

Mucklow v. Whitehead. Openshaw v. The Same.

In some cases, undoubtedly, he may so charge.

[ALDERSON, B. Is not the case, in truth, this: that the attorney draws the brief, having a good precedent in his pocket to enable him to draw it?

PARKE, B. The master has not given the attorney the full benefit of drawing the brief in the first case, but has divided it. Surely the attorney is entitled to be paid for drawing the first brief.]

If an attorney has three causes for trial at the assizes, he is allowed 2*l.* 2*s.* a day for his attendance, but not 2*l.* 2*s.* in respect of each cause. That case is analogous to the present.

[ALDERSON, B. In the event of your principle being adopted, the plaintiff's attorney sustains a great hardship provided the defendants in the second and third actions are insolvent.]

An attorney is to be considered as being paid by his own client. He takes the chance of the defendant being insolvent. The attorney is entitled either to charge the brief to one action and the copy to the other, or to divide the brief and the copy between the two. The matter rests in the discretion of the master.

Hugh Hill, in support of the rule. The costs of the briefs in the two actions cannot be brought into hotchpot. The attorney ought to be allowed his full costs for drawing each brief. It is impossible for the court to speculate upon the facilities that one attorney may have over another in drawing a brief. One attorney, from being familiar with a particular patent, for instance, may find it very easy to draw a brief in an action for an infringement, whereas to another attorney, who has not the same knowledge, the matter may be one of great difficulty.

[PARKE, B. Undoubtedly, taxation must go on some fixed principle.]

He referred to Dax's Practice of the Exchequer, pp. 298 to 301.

Cur. adv. vult.

The judgment of the court¹ was now delivered by

POLLOCK, C. B. In these cases rules *nisi* were obtained to review the taxation of the master, which had been made on the principle that there had not been the same attention and care expended or labor bestowed in preparing the briefs, the same attorney being concerned for the plaintiffs in both cases. We certainly are very desirous, if it were possible, to make any arrangement that would be productive of economy in the administration of justice; but upon considering the case with the greatest attention, we find it impossible to lay down any rule that shall lead to that, without creating more litigation and more expense in discussing the application of it than, probably, money would be saved by the adoption of any such rule; and we are of opinion, that where the business is actually done the masters ought not to take into consideration that the same attorney was employed by two parties, unless there is a consolidation. If there

¹ POLLOCK, C. B., PARKE, B., ALDERSON, B., and PLATT, B.

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a consolidation, that may make all the difference ; but, if the business be really done, although there are two causes, and the same attorney be employed by both parties, we think that is no ground for reducing the ordinary and fair charge which an attorney may make against his client in each case. Of course, as to those things which are done but once and for both causes, such as subpoenaing a witness, making a journey, or any expense of that sort, which is common to both — these of course an attorney cannot charge twice over, but they must be divided according to the discretion of the master, exercised under the rules which are observable in such cases between the two parties. But we think that whether the two cases are contemporaneous, or whether one succeeds the other, or whether there is the same attorney in both, or different attorneys in each, the same rule must prevail ; and if it is some advantage to an attorney who has two clients, each of whom places confidence in him, he is entitled to that ; and if you ought not, where two attorneys are employed, to make any difference with respect to the charge, so neither ought you to make any difference in respect of the charge when the same attorney is employed. He is entitled to the benefit ; and that selection and that confidence, which is the merit of the profession, very likely may lead him to obtain it. We think, therefore, the rules in these cases should be made absolute to review the taxation.

Rules absolute.

DOWN v. PINTO and another.¹

January 21, 1854.

Master and Servant — Contract of Hiring, Construction of — Commencement of Service.

The plaintiff was engaged by the defendants to superintend their smelting works in Spain, by the following letter : “ We shall require you to enter into an engagement for at least three years, at our option, at a salary of 250*l*.” “ We should further require you to visit some of the principal smelting establishments in England, and go out by way of Gibraltar, which is the shortest.” The plaintiff commenced visiting the smelting establishments on the 1st of February, 1850, and shortly after sailed for Spain, where he served the defendants up to the middle of February, 1851, and was then dismissed by them : —

Held, that this was a contract binding the plaintiff to stay three years, and giving the defendants the option of determining the service at the end of each year, and, therefore, that the defendants having dismissed the plaintiff after the commencement of a current year, were bound to pay his salary for that year.

Held, also, (Parke, B., *dubitante*,) that the service commenced on the 1st of February.

THIS was an action for salary. The declaration stated that in consideration that the plaintiff had entered into the defendants' service as foreman of smelting works, at a yearly salary of 250*l*., on the

¹ 23 Law J. Rep. (N. S.) Exch. 109 ; 9 Exchequer Rep. 327 ; 2 Com. Law Rep. 547.

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terms that the plaintiff should remain in the defendants' employ for at least three years, at the option of the defendants, and that the defendants should continue him in their employ from the day of the commencement of such service, to wit, on the 1st of February, 1850, and that the defendants should continue him in their service for a whole year, computed from the day and year last aforesaid, and after the commencement of each subsequent year of the said service, computed from the said last mentioned day in each year, to and until the end and expiration of such subsequent current year, the defendants promised the plaintiff to continue him in their service for such whole year, and after the commencement of each subsequent year to the end of such subsequent year. The declaration then stated the entry of the plaintiff into the service, the dismissal during the currency of the subsequent year, and the non-payment of his salary for such subsequent year.

The defendants pleaded *non assumpserunt* and other pleas.

At the trial, before Talfourd, J., at the last Exeter Summer Assizes, the facts were these:—The plaintiff, who was an engineer and smelter of metals, was engaged by the defendants, who possessed a smelting establishment in Santa Lucia, in Spain, to superintend, as foreman, the management of their works in that place. The contract was contained in a letter to the plaintiff, dated January, 1850, which contained the following passage; "We shall require you to enter into an engagement for at least three years, at our option, at a salary of 250*l.* a year." There was also the following passage: "We should further require you to visit some of the principal smelting establishments in England, and go out by way of Gibraltar, which is the shortest." The plaintiff wrote for answer: "I consent to go out to Santa Lucia on the terms mentioned in your letter," and accordingly came up to London, and on the 1st of February, 1850, commenced visiting various smelting establishments in this country. On the 15th or 16th of the same month he went on board and arrived at Santa Lucia on the 3d of March, where he remained in the defendants' employ up to the middle of February, 1851, when the defendants discharged him, paying him wages as from the 1st of February, 1850, up to the day of the discharge. The action was brought for a year's salary from the 1st of February, 1851 to the 1st of February, 1852.

For the defendants it was objected, first, that there was a variance between the proof of the contract and the statement of it in the declaration, as the correspondence showed the plaintiff to be servant at will to the defendants, and not a yearly servant; secondly, that the service did not commence until the 3d of March, the day of the plaintiff's arrival at Santa Lucia. The learned judge reserved the points, giving the defendants leave to move to enter a verdict for them, and the jury found a verdict for the plaintiff, damages 240*l.*

M. Smith having, in Michaelmas term, obtained a rule *nisi* accordingly,

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Crowder and *Maynard*, now showed cause. The true construction of this contract is not, as will be contended by the other side, that the plaintiff was bound at all events to serve the defendants for three years if they desired it, but that they were at liberty to discharge him at a moment's warning. It is not likely that a workman like the plaintiff would engage himself in a foreign country on such terms.

[PARKE, B. How do you construe the words "at our option?"]

The meaning of that phrase is "if we please, and if we do not insist that you should remain, you may leave if you are so disposed." The plaintiff was, at all events, a yearly servant, and is entitled to a year's salary. The next question is, as to the time of the commencement of the service. The plaintiff contends that his service commenced on the 1st of February, 1850, the day when, at the desire of the defendants, he commenced his visits to the various smelting works in England. The defendants contended, on the other hand, that his service did not commence until he arrived at Santa Lucia. It is, however, to be observed, that the defendants themselves have given a construction to this contract, for they have paid the plaintiff's salary for the year 1850 from the 1st of February in that year. *Elderton v. Emmens*, 4 Com. B. Rep. 479, applies.

M. Smith and *Finn*, in support of the rule. This is not the case of a yearly contract. If the terms of the agreement are looked at without reference to the surrounding circumstances, it is clear that the parties contemplated that the defendants should have the power of discharging the plaintiff at a moment's notice. *Doe d. Bastow v. Cox*, 11 Q. B. Rep. 122, is in point.

[PARKE, B. Surely the words of the contract imply a yearly salary.

ALDERSON, B. This is a yearly service which took from the party serving the option of putting an end to it until the expiration of three years, after which time he was bound to terminate it in the way in which a yearly servant is bound. The plaintiff says "I will stay three years, and if I am dismissed in the middle of a year I am to have a claim for a year's salary."]

(This point was ultimately given up by the defendants' counsel.)

Secondly, as to the commencement of the service. The contract admits of three interpretations: first, that the service began on the 1st of February; secondly, that it began on the day when the plaintiff went on board ship, namely, the 15th or 16th of February; and thirdly, that it began on the plaintiff's arrival at Santa Lucia.

[POLLOCK, C. B. In my opinion, the service began on the 1st of February, the day when the plaintiff began to visit the smelting works. It is the same as his getting a berth on board the vessel; he was preparing to go, and from that time must be considered as in his employers' service, and as having commenced his journey. He visited the smelting works at his employers' request.]

He was not to be considered as a foreman until he had actually left this country. He was not entitled to be paid until he had commenced the work.

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POLLOCK, C. B. I think this rule must be discharged. There are two ways in which this contract may be viewed. First, that it means that the defendants shall be at liberty to dismiss the plaintiff at any period of the service, and that the words "at my option" extend over every moment of the three years. That point, however, is, in my opinion, quite untenable. The option to be exercised was as to whether the plaintiff was to remain one, two, or three years. It was a yearly hiring, which gave to the party hired the prospect of serving one, two, or three years; and the defendants might, if they had pleased, have insisted on his remaining in their service for three years; but the defendants were not authorized to dismiss him at any period of the same year after its commencement, or if they did they rendered themselves liable to compensate him in damages.

Again, supposing the plaintiff to have entered a second year's service, it might be a question if he could be dismissed before the end of that year without reasonable notice, and whether such reasonable notice had been given would be a question for the jury. It is not, however, material to consider that point. Then, as to the commencement of the service. If we look at the acts of the parties we shall find that the plaintiff was paid by the defendants as from the 1st of February, and it is difficult to discard that fact. I admit it is not very easy to discover the meaning of the parties. It is contended that the words, "we shall require you to go out by way of Gibraltar," show that the plaintiff did not become superintendent until he actually went, and that he is not entitled to his salary from the 1st of February. But I think the words of the defendants' letter are sufficiently large to include in the employment the visit of the plaintiff to the smelting establishments in this country, and the preparation for his journey. He was qualifying himself for the service. Let us look at the terms of the letter. They are, "we shall further require you to visit some of the principal smelting establishments in England." That requisition he was bound to obey. The meaning of that is, that from that period the plaintiff became the defendants' servant, and the defendants have acted throughout on that supposition. The learned judge was right in the construction he put on this contract, and we shall not disturb the verdict.

PARKE, B. I entertain no doubt whatever on the first point. What particularly weighs with me is, that the contract contains no provision for the payment of a proportionate part of the salary. Payment, for instance is not to be at the rate of 250*l.* per annum. Then, as to the second point. If the letter had not contained the clause requiring the plaintiff to visit the various smelting establishments in England, I should have been disposed to assent to the construction put by the defendant's counsel upon this contract, that the service did not commence until the plaintiff's arrival at Santa Lucia; and notwithstanding that clause I still entertain doubts. It is true that the defendants, by paying the plaintiff his salary from the 1st of February, have themselves put a meaning upon the contract; and although we ought not to look at that fact for the purpose of constru-

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ing this agreement, yet it is satisfactory to find that they entertain that view of it. On the whole, although I entertain some doubts on the point, still they are not strong enough to induce me to differ from my lord and my brother Alderson, and, as I understand, from the opinion of my brother Talfourd, on the same point.

ALDERSON, B. I am of the same opinion. I entertain no doubt on the points. There was to be an option on the part of the defendants as to the plaintiff being a yearly servant for one, two, or three years, and after three years the option was to be mutual. Then, as to the commencement of the service. The whole agreement is expressed in the first letter. That letter contains two requirements: first, that the plaintiff should enter the defendants' service; next, that he should visit the smelting works. He is to serve the defendants, and to visit the works. This service then commenced on the 1st of February, when he was required to visit the smelting works.

Rule discharged.

LYGO v. NEWBOLD.

January 13, 1854.

Negligence — Non-Liability of Defendant for Injury arising from Plaintiff's wrongful act — Authority of Servant.

The plaintiff employed the defendant to remove her goods in his cart for hire. With the consent of the defendant's carman, the plaintiff got on the cart with the goods, and on the way the cart broke down, and the plaintiff was seriously injured, and her goods broken: —
Held, that the plaintiff was not entitled to recover damages for the personal injury.

ACTION for negligence. The declaration stated that the plaintiff employed the defendant for reward to carry her goods and chattels in the defendant's cart from Carnaby Street to New Inn Passage, and that the cart so used in conveying the goods was unsafe and insecure, and in an unfit and improper state and condition for the carriage and conveyance thereof, and the defendant so negligently behaved and conducted himself in the premises, that while the cart was proceeding under the care of the defendant's servant with the said goods and chattels in and upon the same, by reason of the defendant's negligence, and of the insufficiency of the cart, it broke down, and by means thereof divers of the said goods and chattels were broken and spoiled; and also by means thereof, the plaintiff who was then lawfully and rightfully, and by and with the consent of the defendant, riding in the said cart, and accompanying the said goods and chat-

¹ 23 Law J. Rep. (N. S.) Exch. 108; 9 Exchequer Rep. 302; 2 Com. Law Rep. 449.

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tels on their way to New Inn Passage aforesaid, was cast and thrown with great force and violence from and out of the said cart, and thereby one of the legs of the plaintiff was broken, and she was otherwise greatly bruised and injured, and was not only confined to her bed and wholly unable to work at her business of a dressmaker, and was unable to walk without crutches, and is likely to be permanently injured, and to remain a cripple for the rest of her life.

Plea, not guilty.

At the trial, before Pollock, C. B., at the London Sittings, after Michaelmas term, 1853, it appeared that the plaintiff had hired one of the carts of the defendant, who was a carrier, to convey her furniture from Carnaby Street to New Inn Passage, and one load was safely conveyed. After placing the second load on the cart the plaintiff and the defendant's carman (in whose care the cart was) got upon it. While on their way a crack was heard, and the carman got down. The plaintiff said, "If there is any danger I will get down." The carman said, "No; stay where you are." A hammer and nails were procured and something done to the cart, which was then driven on a short distance when a wheel came off and the plaintiff and her goods were thrown out and her leg was broken.

The Chief Baron directed the jury that the defendant was not responsible for the personal injuries to the plaintiff, his contract being to convey the goods only. It was eventually arranged that a verdict should be taken for the plaintiff for 1*l.* 15*s.* in respect to the injury to the goods, with leave to the plaintiff to move to increase the damages by the sum of 25*l.* for the personal injuries.

Hoggins now moved accordingly. The defendant's liability is independent of contract, the injury to the plaintiff being the result of the improper and unsafe condition of the cart.

[PARKE, B. I tried a cause two years ago under just the same circumstances. There is no contract here to carry the plaintiff safely, but only her goods. The plaintiff's getting into the cart was a trespass.]

Supposing the plaintiff, instead of being in the cart, had been walking or standing on one side, and the cart had fallen upon her, would not the defendant have been liable? In *Lynch v. Nurdin*, 12 Q. B. Rep. 29, the defendant having left his horse and cart in the street, the plaintiff, a child, got upon the cart in play, and in consequence of another child leading the horse on, the plaintiff was thrown out and hurt, and it was held that the defendant was liable, although the plaintiff was a trespasser.

[PARKE, B. If the plaintiff had been a grown-up person, the defendant would not have been held liable.]

The judgment did not proceed merely on the ground of the plaintiff's tender age, but on the defendant's misconduct, for it was assumed that the plaintiff was wrongfully in the cart. Lord Denman, C. J., in delivering the judgment of the court, expressly stated that the plaintiff had done wrong; that he had no right to enter the cart, and abstaining from doing so would have escaped the mischief, and yet the de-

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defendant was held to be liable for his negligence. In the present case, however, the declaration alleges that the plaintiff got into the cart with the defendant's consent. The fact that the defendant was paid for the carriage of the goods, and not for the carriage of the plaintiff herself, is immaterial, the defendant being equally bound to take her carefully. *Wilson v. Brett*, 11 Mee. & W. 113; s. c. 12 Law J. Rep. (N. S.) Exch. 264.

[PARKE, B. No doubt a person who undertakes to provide for the conveyance of another is responsible, although he does so gratuitously; but the carman had no right or power to consent to the plaintiff getting into the cart, and the defendant is not responsible for that act of his servant. In *Lynch v. Nurdin* the plaintiff had taken as much care as could be expected from a child of his age. You may think yourself fortunate that the defendant has not brought an action for the plaintiff's trespass.

ALDERSON, B. *Nurdin v. Lynch* appears to me to be just the same as the case of a child who gets up behind a gentleman's carriage while it is going on, and falls between the wheels, and then brings an action against the owner of the carriage for permitting him to do it, while the real negligence is that of the parent who allows his child to be at large.]

POLLOCK, C. B. There will not be any rule in this case. It has just been suggested that the case of *Nurdin v. Lynch* goes too far, and would extend to render owners of carriages liable for the wrongful acts of children unknown to them in getting up behind in the absence of any servant to prevent them. And if the present case were not distinguishable from that, I for one should not refuse a rule. But this case is entirely distinguishable from *Nurdin v. Lynch*, where the plaintiff was allowed to recover for an injury which was occasioned by the negligence of the defendant, though the immediate cause of the injury was an act which, if committed by a grown-up person would have been culpable, was nevertheless not so blamable when done by a child of tender years, as to make her the sole defaulter. In the present case the plaintiff brought the mischief entirely on herself. If the cases were not clearly distinguishable in principle, the court would not have overruled the decision relied on without discussion, but as they are distinguishable there will be no rule.

PARKE, B., ALDERSON, B., and MARTIN, B., concurred.

Rule refused.

Hancock v. Noyes.

HANCOCK v. NOYES.¹

January 26, 1854.

Patent, Infringement of — Plea, Disallowance of.

In an action for infringement of a patent, the court disallowed the following plea: that the plaintiff, having petitioned for letters-patent, represented to the solicitor-general, to whom the matter was referred, that the invention consisted of matters mentioned in a paper writing exhibited to the solicitor-general, (setting it forth,) who, confiding therein, reported that the letters-patent might be granted; that, after the grant of the letters-patent, the plaintiff enrolled his specification in certain terms, and falsely described his invention therein; and that so much of the invention as was stated in the specification, was not part of the invention in the paper writing and letters-patent mentioned, and was not part of the invention for which the letters-patent were granted.

THIS was a rule, calling on the defendant to show cause why an order of Platt, B., should not be rescinded or varied so far as related to the liberty granted to the defendant to plead the 3d and 4th pleas. The declaration, which was for an infringement of the plaintiff's patent, stated that the plaintiff was the first inventor of a new manufacture, namely, of an improvement in the preparation of caoutchouc, for rendering leather, cloth, &c., waterproof, and that letters-patent were granted to him on certain conditions, which he had fulfilled, and that the defendant infringed the plaintiff's right. The third plea, allowed by Platt, B., to be pleaded, was as follows: that the plaintiff did, by his petition to her Majesty, represent that he had found out an improvement in the manufacturing of caoutchouc, and therefore prayed her Majesty to grant him her letters-patent for the same; that the petition was referred to the attorney or solicitor-general for consideration, and delivered to the solicitor-general to consider and report to her Majesty thereon; that whilst the solicitor-general was considering thereon, the plaintiff represented and suggested to him that the invention consisted of certain matters and things mentioned in a paper and exhibited to and deposited with the solicitor-general, which paper was as follows. (The paper was then set out in the plea.) That the solicitor-general considered the said paper writing, and believing and confiding therein, reported that her Majesty might grant letters-patent to the petitioner; that the letters-patent were granted accordingly; that after the granting of the letters-patent the plaintiff caused a specification, as mentioned in the third plea, and no other instrument, describing the nature, &c., of the said invention, to be enrolled in chancery; that the plaintiff did, by the said specification, falsely describe as part of the invention so much of the said supposed invention in the specification mentioned as the plaintiff by his specification thirdly claimed, and what is claimed in these words. [The terms were then set out.] That so much of the said supposed invention in the specification thereby

¹ 23 Law J. Rep. (N. S.) Exch. 110; 9 Exchequer Rep. 388.

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claimed as his invention was not part of the supposed invention in the said petition and paper writing and letters-patent mentioned, and was not any part of the supposed invention for which her Majesty granted the letters-patent.

The fourth plea was similar in substance, stating the plaintiff to have acted with regard to the second clause in the specification in the same manner as he had done with regard to the third clause.

Atherton and *Russell* showed cause. The pleas are good in substance.

[MARTIN, B. The pleas amount to an argumentative traverse of the specification.]

The pleas are objected to by the plaintiff on the ground of their tending to embarrass him. But there is no foundation for such a suggestion. Questions similar to those now proposed to be raised by these pleas have arisen in two cases. One in *Crossley v. Potter*, tried before the Chief Baron at the Middlesex Sittings in last year, and another of *Onions v. Crowley*, which was tried at the last Liverpool Assizes. Again, in *Hancock v. Smith*, Coleridge, J., at chambers, made an order for permitting a plea similar to the present to be pleaded, and that order was never appealed against. This plea, instead of embarrassing the plaintiff, gives him full information as to the intended defence.

[POLLOCK, C. B. The objection to this plea is that it is pleading evidence.

ALDERSON, B. The defence is, that the patent was granted for something not stated in the specification.]

Thesiger and *Webster*, in support of the rule, were not called upon.

Per Curiam.¹ The rule must be absolute for rescinding this order. The defendant may plead *non concessit* and, if he pleases, a plea that the invention described in the specification was not the invention for which the letters-patent were granted.

Rule absolute.

THE BISHOP OF LONDON v. M'NIEL.²

January 30, 1854.

Bond, Action on — Payment into Court.

In an action on a bond, money cannot be paid into court.

In an action on an administration bond, breaches were assigned in the declaration, and the defendant, by way of plea, set out the condition, and paid money into court as to certain breaches, and as to the residue averred performance or excuse for non-performance : —

Held, that the plaintiff was entitled to strike out the whole plea, and proceed to assess damages.

¹ POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

² 23 Law J. Rep. (N. S.) Exch. 111; 9 Exchequer Rep. 400; 10 Jur. 814.

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DECLARATION on a bond given by the defendant for the due administration by one C. Broadwood of the estate and effects of A. Broadwood, deceased, setting out several breaches. The defendant set out the condition in his plea, and pleaded as to so much as relates to the said C. Broadwood not making and exhibiting in the Consistory Court a true and perfect inventory of the goods and chattels of the said A. Broadwood, "the defendant brings into court the sum of 1*l*., and says that the same is sufficient to satisfy the said breaches," and as to the said residue he averred performance or excuse for non-performance.

A rule had been obtained calling on the defendant to show cause why the plea should not be struck out. Against which —

Henderson showed cause. The plea is good under the 70th and 71st sections of the Common Law Procedure Act, by which payment into court is permitted in all actions, with certain exceptions, by way of compensation or amends. If the payment is sufficient, it is a bar to future proceedings.

[PARKE, B. What judgment would be given if the jury should think the amount sufficient? The plaintiff would lose the benefit of the statute 8 & 9 Will. 3, c. 11. The payment is only for the breach, but the judgment ought to be for future breaches.]

It is unreasonable that for a breach by which only nominal damages are caused, a judgment should be entered up for a large amount, and so bind the defendant's lands. At any rate, the plea raises a fit question for argument on demurrer, and it is not calculated to prejudice, embarrass, or delay the fair trial of the action, so as to come within the 52d section. It is right in form, and the defendant ought not to be deprived of bringing error.¹

[POLLOCK, C. B. We certainly ought not to interfere on motion, unless the matter is perfectly clear.]

The application ought, in any case, to be limited to the first plea.

Raymond, in support of the rule. The plea is altogether bad, and within the provision of the 52d section. It is only one plea separated into several parts. The declaration is on the bond, and the defendant has pleaded to the condition instead of to the bond itself. The only answer he could have, would be complete performance of all the parts of the condition. By admitting the breach of any one, he entitles the plaintiff to judgment. The 70th section is only a reënactment of 3 & Will. 4, c. 42, s. 21, and *England v. Watson*, 9 Mee. & W. 333; decided that payment into court could not be pleaded in an action on a bond. Besides, the 96th section expressly excludes the 8 & 9 Will. 3, c. 11, from the operation of the act.

PARKE, B. It is unquestionably a bad plea. It is no answer to

¹ Although in modern times no instance has occurred of a bill of exceptions being tendered because a plea has been disallowed, it would seem to lie in such cases. See authorities cited in *Raymond on Bills of Exceptions*, 54, 55.

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the action, but is pleaded to the damages. The 70th section of the **Common Law Procedure Act** applies only where the money is paid **in** satisfaction of the cause of action. The plaintiff is entitled to **judgment** as security against future damages. If there had been **judgment** by default on a common declaration, the plaintiff would **have** had to assign breaches, (*Webb v. James*, 8 Mee. & W. 645,) but **here** they are assigned in the declaration. It is only one plea, and the **whole** must be struck out, and the damages can be assessed by the **master** or a common jury.

ALDERSON, B. The explanation given by my brother Parke gives full effect to the 52d, 70th, and 96th sections.

POLLOCK, C. B., and PLATT, B., concurred.

Rule absolute.

THE SOUTH-EASTERN RAILWAY COMPANY v. THE EUROPEAN AND AMERICAN ELECTRIC PRINTING TELEGRAPH COMPANY, and FRENCH.¹

January 16, 1854.

Trespass — Railway crossing Highway — Meaning of "Directly across."

The European and American Electric Printing Telegraph Company's Act, 14 & 15 Vict. c. 135, s. 37, provides that the company may lay down and place their pipes, &c., under any public roads, streets, and highways, and along or across such places for the purpose of the telegraph, and break up the pavement or soil for that purpose; but that nothing in this provision contained shall extend to any railway or canal, except that it shall be lawful for the company to carry their wires, pipes, &c., "directly, but not otherwise, across any railway or canal." The South-Eastern Railway Company, in pursuance of the provisions of their act, had carried their railway on a level across a part of the public highway in the city of Canterbury, the public having the full use of the highway, except when the trains were passing : —

Held, that the highway was not a highway within the meaning of the European and American Electric Printing Telegraph Company's Act, and that it was an act of trespass to dig and bore under the railway for the purpose of carrying the telegraph under the spot where the railway crossed the highway.

THE declaration stated that the plaintiffs, before and at the time of the committing by the defendants of the acts hereinafter mentioned, were proprietors and possessed of a certain railway, made by the plaintiffs under and by virtue of the 7 & 8 Vict. c. 25, intituled "An act to enable the South-Eastern Railway Company to make a railway from the said South-Eastern Railway, near Ashford, to the city of Canterbury, and the towns of Ramsgate and Margate, and to join the Canterbury and Whitstable Railway," which said railway in the said act of parliament mentioned, and thereby authorized to be made,

¹ 22 Law J. Rep. (N. S.) Exch. 113; 9 Exchequer Rep. 363; 2 Com. Law Rep. 467.

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had been and was before and at the time of the committing by the defendants of the acts hereinafter mentioned duly made and completed, and was then in use as a railway for the passing and repassing of engines and carriages thereon, and which said railway, at a certain place in the parish of St. Dunstan, in the city of Canterbury, then crossed and still crosses a certain public road there on the level, under and by virtue of the authority of the said act of parliament in that behalf, and that on the 12th of October, A. D. 1852, the said A. B. Frend and the said European and American Electric Printing Telegraph Company, by the said A. B. Frend and others, as the servants and agents of the said European and American Electric Printing Telegraph Company in that behalf, dug and bored into and under the said last-mentioned railway at the said place where the said last-mentioned railway so crossed the said public road as aforesaid, and also dug and bored partly in, into, and through the soil and ballast of the plaintiffs, being part of the said last-mentioned railway, and of the structure, foundation, and support thereof, and partly in, into, and through the said public road there, and the structure and soil thereof, and without leave or license, and against the will of the plaintiffs laid down and placed divers wires, pipes, and tubes under the said railway and road there, and so near to the surface thereof respectively, and in such position and manner as thereby to cause hindrance and obstruction in and to the necessary repairs by the plaintiffs of the said railway and road, and to make the said repairing thereof respectively more difficult, and kept and continued there the said wires, pipes, and tubes so placed until the commencement of this suit, doing damage there to the plaintiffs as aforesaid.

Plea — That the said European and American Electric Printing Telegraph Company in the declaration mentioned are a body incorporate, and are the European and American Electric Printing Telegraph Company mentioned in the European and American Electric Printing Telegraph Company's Act, 1851, and the said road in the declaration mentioned, was, at the time of the doing of the several things in the declaration and in this plea mentioned, and still is a public road, street, highway, and thoroughfare in and leading through the city and county of the city of Canterbury; and the same company, after the passing of the same act, having occasion and desiring, in the exercise of the powers, rights, and privileges given to and vested in the same company by the same act, and for the purposes of the undertaking in the same act mentioned, and for working under and by virtue and according to the intent of the same act, the several inventions in the same act mentioned, to carry directly across the said railway the said wires, pipes, and tubes, by laying down and placing, keeping, and continuing as hereinafter mentioned, under the said railway and road, the said wires, pipes, and tubes in manner and form as in the declaration mentioned, they, the said company, by their said servants, in their own right, and the said A. B. Frend, as the servant of the same company, and by command of the same company, did, in and by the exercise and execution of the said powers, rights, and privileges, and for the purposes of the same undertaking, and for

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working the said inventions, and for the purpose of such intended electric telegraph of the said company, as in the same act mentioned, and for no other purpose whatsoever, and in pursuance and according to the true intent and meaning of the same act, break up and open the pavement and soil of the said public road at the place where the said railway so crosses the said public road on the level, as in the declaration mentioned, and carry directly, but not otherwise across the said railway and so and in such manner, and at such place and time as not in anywise to damage or be likely to damage the said railway or any of the works connected therewith, or at all to interrupt or interfere with the use thereof, or the passage or conveyance of traffic along the same, the said wires, pipes, and tubes, by laying down and placing, keeping, and continuing under the said railway and road the said wires, pipes, and tubes as in the declaration mentioned, the said wires, pipes, and tubes then and there being the wires, pipes, and tubes of the same company, and the said wires, pipes, and tubes, and the said carrying, laying down, placing, and keeping and continuing of the same as aforesaid, then and there being necessary and convenient for the purpose of the said intended electric telegraph, and in so doing and in such exercise of the said powers, rights, and privileges, and for the purpose aforesaid, they, the same company, by their said servants, in their own right, and the said A. B. Friend, as the servant and by the authority and command of the same company, necessarily and unavoidably a little dug and bored into and under the said railway, at the said place where the said last-mentioned railway so crossed the said public road as aforesaid, and also necessarily and unavoidably a little dug and bored partly in, into, and through the said soil and ballast of the said plaintiffs, and partly in, into, and through the said soil and ballast of the said plaintiffs, and partly in, into and through the said public road there and the structure and soil thereof, in manner and form as in the declaration alleged, but so and in such manner and only at such place and time as not in anywise to damage or be likely to damage the said railway or any of the works connected therewith, or at all to interrupt or interfere with the use thereof, or the passage or conveyance of traffic along the same within the meaning of the said act of parliament, and doing as little damage to the plaintiffs as might be on the occasion aforesaid, and being ready and willing and offering before and at the time of the committing the said several acts, and being at all times since ready and willing to make compensation for all damage caused or to be caused to the plaintiffs by reason of the premises, according to the true intent and meaning of the same act, which are the matters complained of in the declaration. And the defendants further say, that before the said doing of any of the matters and things above mentioned, the same company gave to the persons under whose control and management the said public road then was, notice in writing of the intention of the same company so to open and break up the same, and to do the matters and things aforesaid more than three days before the commencement of the said operation, according to the true intent and meaning of the same act, and of the provision in the

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same act in that behalf contained. And the said public road was so broken up as aforesaid under the superintendence of the said persons so having the control and management of the same as aforesaid, and attending to such plan as was agreed upon between the said persons and the same company, according to the true intent and meaning of the same act.

Replication — That at the times of the committing of the wrongs complained of, there was nothing to prevent the defendants from carrying the said wires, pipes, and tubes, and they might and could have carried the same directly across the said railway without digging and boring into and under the same, and in, into, and through the said soil and ballast of the plaintiffs, and that after and by reason of the wrongs complained of, the repair and renovation of parts of the said soil and ballast of the plaintiffs being part of the said railway, became and was in some measure less easy and convenient by reason of the necessity of avoiding or interfering with the said wires, pipes, and tubes, in the course of such repair and renovation.

Demurrer and joinder.

R. Clarke, in support of the demurrer. The main question raised in these pleadings is the extent of the powers given by the European and American Electric Printing Telegraph Company's Act, 14 & 15 Vict. c. 135, where it is necessary to pass a line of railway. The material sections are sections 37 and 38.¹

[*PARKE, B.* The 37th section gives power to go under a highway, but not under a railway.]

The spot in question was part of the Canterbury and Whitstable turnpike road, and did not cease to be a highway because the railway passed over it at certain times. By their act, the 7 & 8 Vict. c. 25, s. 15, turnpike roads in general may be taken over the railway, or the railway over turnpike roads; and by section 18 it is expressly enacted that the passage over this turnpike road is to be free and

¹ Section 37 enacts, "That it shall be lawful for the company from time to time to lay down and place under any public roads, streets, highways, and other thoroughfares, and either along or across such places, any wires, pipes, or tubes which shall or may be necessary or convenient for the purposes of any electric or other telegraph, or intended electric or other telegraph, and from time to time to alter, repair, amend and reinstate the same, and for such purpose to break up or open the pavement or soil of any such places, the company doing as little damage as may be, and making compensation for all damage to be caused thereby to the parties who shall have sustained such damage; provided that nothing in this present provision contained shall extend or apply to any railway or canal, or to any of the works or conveniences connected with any railway or canal, except that, subject to the provisions of this act, it shall be lawful for the company to carry their wires, pipes, and tubes, directly, but not otherwise, across any railway or canal, but so and in such manner and only at such place and time as not in any wise to damage or be likely to damage the railway or canal in any of the works connected therewith, or at all to interrupt or interfere with the use thereof, or the passage and conveyance of traffic along the same."

Section 38 enacts, "That before any street shall be opened or broken up by the company, they shall give to the persons under whose control or management such street may be, or their clerk or surveyor, notice in writing of their intention to open or break up the same, three days at least before the commencement of such operation."

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open, except at the time when any engine or carriage may be crossing the same on the railway. The company, therefore, only acquired an easement and not any property. The Electric Telegraph Company have, therefore, done only what they might do by their act of parliament, in taking their tubes under this public road.

[ALDERSON, B. If it is a highway with a railway, it is not a highway.]

MARTIN, B. It is very reasonable to say the Electric Telegraph Company shall not undermine the railroad by carrying the wires under it.]

The plea expressly avers that the requirements of the act were complied with as to notice and as to compensation. Where a party is entitled only to an easement which is interfered with under the powers of an act of parliament, he cannot bring trespass, but should apply for compensation. *Thicknesse v. The Lancaster Railway Company*, 4 Mee. & W. 472. Here the replication shows that there was no damage done until after the wrongs complained of. It would be highly inconvenient if the electric wires must be carried at a height over a railway. He also cited *Semple v. The London and North Western Railway Company*, 1 Rail. & Can. Cas. 481, and stated that Lord Campbell, C. J., had in another case at Nisi Prius ruled that the construction now contended for was correct.

Willes, contra, was not called upon.

PARKE, B. I am of opinion that the plaintiffs are entitled to judgment. They are a railway company incorporated by an act of parliament, which among other things empowers them to make their railroad across a level which is part of a highway. They do not, it is true, acquire a property in the highway, but they have the right of passing at all times, and they have the property in the materials necessary to make the railway, such as sleepers, &c., and they complain in their declaration that the defendants have dug and bored under the railway so situated so as to cause an interference with and be injurious to their rights by obstructing the repairs to the railway. The defendants justify under the provisions of the 14 & 15 Vict. c. 135, but they have no such power unless it be given under the 37th section, and the question is, whether they have acted within that section. [His lordship read the section and proceeded.] They are empowered to place wires, pipes, and tubes, &c., under any highway; but as to railways, they can only carry their wires, pipes, and tubes, directly across a railway. Across seems, therefore, different from under, and the power to carry "across" does not enable them to go under. It may be that this prohibition would not apply if the railway were carried over a highway at a great height, for then the highway and railway might be considered to be independent of each other. Even if "across" could be construed equivalent to under, the conditions in the latter part of the section must be complied with, whereas it is clear that those conditions have not been complied with

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in the present instance, for the defendants have done what was a damage to the railway.

ALDERSON, B. I am of the same opinion. Looking at the 37th section, the defendants have no power to carry the wires and tubes under a railway situated as that of the plaintiffs is.

MARTIN, B. The plea is bad. The railway of the plaintiffs crossed the highway upon a level, and their property is imposed upon the highway, and the defendants seek to justify breaking up the railway. But the statute confers no such right, and it is reasonable that they should be required to adopt some other mode of passing the railway.

Judgment for the plaintiffs.

PROCTOR AND WIFE v. BROTHERTON.¹

January 3, 1854

Staying Proceedings — Costs, Security for — Husband and Wife — Executrix.

An action having been brought by a married woman as executrix, in which her husband was made co-plaintiff, the court refused to order the proceedings to be stayed altogether, but ordered they should be stayed until security was given to the husband by the attorney against the costs of the action, the affidavits showing that the husband and wife were living separate, and that the action was brought without his sanction and against his will.

Milward moved for a rule, calling on the attorney appearing on the record as the attorney for the plaintiffs to show cause why the suit should not be set aside and all the proceedings stayed. The affidavits show that the action is in respect of debts due to the female plaintiff as executrix, and that the attorney has been employed by her without the consent and against the will of her husband, and that the plaintiffs are living separate. It is now settled that, since the husband is answerable for the wife's acts, she is not capable of doing any act of administration which may be to the prejudice of her husband without his concurrence, (Williams on Executors, 825,) and she has no right to sue against his will, or to employ an attorney. The husband will be answerable for the due administration of the assets, and the wife should not be allowed to proceed so as to get the money into her hands, or those of the attorney appointed by her.

Hugh Hill showed cause in the first instance. It is clear from the affidavits in answer that the wife is living separate from her husband

¹ 23 Law J. Rep. (N. S.) Exch. 116; 9 Exchequer Rep. 486; 2 Com. Law Rep. 496.

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with his assent, and he cannot interpose to prevent her calling in the property of the testator. In *Innell v. Newman*, 4 B. & Ald. 419, where the husband, who lived separate from his wife under a deed, and the wife, as executrix, brought an action, the court would not allow a release given by the husband to be pleaded.

[POLLOCK, C. B. The ground of that decision was, that it was a fraud.]

In *Chambers v. Donaldson*, 9 East, 471, the court refused to stay the proceedings where an attorney brought an action for the wife, although the husband joined with the defendant in the application. Here, it does not appear that the defendant joins in the application.

Milward stated he appeared for the defendant as well as the husband; but cited *Hubbart v. Phillips*, 13 Mee. & W. 702, to show that either might make the application.

Per Curiam.¹ The rule will be absolute to stay the proceedings until security is given to the satisfaction of the master to indemnify the husband against the costs of the action. We cannot grant the rule to stay the action altogether, for we should be prejudicing the collection of the assets of the testator, and the administration of the estate in due course.

Rule absolute, accordingly.

CHAPLIN v. LEVY.²

February 2, 1852.

Bill of Exchange — Admission of Acceptance, Effect of.

Where, in an action against the acceptor of a bill of exchange, plea, *non acceptavit*, the defendant's attorney signed an admission that the acceptance was in the handwriting of the defendant, without adding the usual clause, "saving all just exceptions to the admissibility of evidence":—

Held, that the jury were warranted in finding for the plaintiff, notwithstanding the non-production of the bill.

THIS was an action, by the plaintiff, against the defendant, as the acceptor of a bill of exchange.

Plea — denying the acceptance.

At the trial before Erle, J., at the last Liverpool Summer Assizes, the facts were these: the plaintiff put in evidence the following admission, signed by the defendant's attorney:—"I hereby admit the acceptance of the bill of exchange, on which this action is brought, is in the handwriting of the defendant." The bill itself was not produced, and no notice to produce it had been given by the defendant.

¹ POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

² 23 Law J. Rep. (N. S.) Exch. 117; 9 Exchequer Rep. 531; 2 Com. Law Rep. 117.

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Under these circumstances, it was objected, for the defendant, that the bill itself ought to be produced. The learned judge overruled the objection, holding that the admission itself afforded *prima facie* evidence for the jury, and rendered the production of the bill unnecessary, and under his direction the plaintiff had a verdict.

A rule *nisi* for a new trial having been obtained, on the ground of misdirection, —

Manisty showed cause. The admission of the defendant's attorney rendered it unnecessary for the plaintiff to produce the bill; there was at least evidence upon which the jury were warranted in finding a verdict for the plaintiff. If a defendant writes a letter stating that on a certain day he accepted a bill of a particular amount, at three months, and a writ is sued out immediately on the expiration of that period, and a bill of that description is declared upon, that would be *prima facie* evidence, on which the jury might act, although the bill itself might not be produced. *Vane v. Whittington*, 2 Dowl. P. C. (N. S.) 757, may be relied on by the other side, but is not in point. That case decides that a party who has admitted his handwriting to a bill of exchange may, when the bill is produced, object to the sufficiency of the stamp; but there the bill was produced, and moreover the admission contained the proviso, "saving all just exceptions to the admissibility of such evidence." In *Marshall v. Green*, 1 Ry. & M. 41, it was ruled, that a plaintiff is bound to produce a bill or note on an inquisition after judgment by default; but the reason there given that the jury may see whether there is any indorsement of payment on it, does not apply here. *Lane v. Mullins*, 1 Dowl. P. C. 562, is in point. There, after judgment for the plaintiff, on demurrer to a plea to a count on a bill of exchange, the plaintiff, on a trial to assess the damages, and upon other issues, was held entitled to a verdict for the amount of the bill, without producing it. The court there distinguished *Marshall v. Griffin*, and said, "It would be an abuse of the power of the court to compel the production of a bill for the sole purpose of seeing whether a stamp of one penny less than what the law requires had been affixed to it." (He was then stopped by the court.)

Temple, contra, for the defendant, in support of the rule. The plea of *non acceptavit* put in issue not merely the defendant's handwriting, but also the validity of the bill. The plaintiff was bound, therefore, to produce the instrument, that the court might see whether it was duly stamped, or whether it was such an instrument as, being unstamped, rendered the party making it liable to a penalty under the 10th section of the 31 Geo. 3, c. 25. Again, the plea in this case puts in issue the fact whether the bill has been altered or not, and, therefore, the bill itself ought to be produced.

[PARKE, B. The defendant should have inserted in his admission the clause "saving all just exceptions."]

He cited and referred to *Davis v. Dodd*, 4 Taunt. 602; *Hansard v.*

Orme v. Galloway.

Robinson, 7 B. & C. 90; *Clay v. Crofts*, 20 Law J. Rep. (N. S.) Exch. 361; s. c. 6 Eng. Rep. 485; *Poole v. Smith*, Holt's N. P. 144; and *Dwyer v. Collins*, 7 Exch. Rep. 639; s. c. 12 Eng. Rep. 532.

PARKE, B. I think this rule must be discharged. It must be assumed, under the circumstances of this case, that the bill is a proper bill. The admission made by the defendant's attorney afforded *prima facie* evidence on behalf of the plaintiff, which might have been rebutted. The truth is, that admission went too far; it ought to have contained a "saving of all just exceptions." Without doubt the defendant, by taking a proper course, might have shown that the bill was improperly stamped, for he might have given a notice to produce the bill, and upon its non-production might have given notice of its contents; but here no such notice had been given. All that we have to decide is, that the judge was right in the view he took of this case, and that there was evidence which, being unanswered, justified the jury in returning a verdict for the plaintiff.

ALDERSON, B., PLATT, B., and MARTIN, B., concurred.

Rule discharged.

ORME and another, Executors of JALSON, v. GALLOWAY.¹

February 7, 1854.

Contract, Construction of — Consideration — Pleading — Amendment.

To an action for money lent, and for interest, the defendant pleaded, as to the money lent, that originally no interest was payable to the plaintiff's testator, but that afterwards it was agreed that the defendant should pay interest, and should not be required to pay the principal until the expiration of six months' notice by the testator, requiring payment, and that no such notice had been given. The defendant and the testator were merchants, and in 1847 the defendant was indebted to the testator in a balance, which was thus stated in a letter sent by the testator to the defendant in January, 1847:

	£	s.	d.
"Balance as by my book.....	749	8	7
Deduct as allowed	464	16	6
	<hr/>		
	£284	12	1

The balance settled as due by you to me payable in the course of the present year, without interest." To this statement the defendant assented. There was evidence of an usage amongst merchants to pay interest upon balances. It was proved that in June, 1848, the testator agreed not to require payment of the principal until the expiration of six months' notice of payment:—

Held, that as by the terms of the testator's letter, and by the mercantile usage, interest was payable at the end of 1847, there was no consideration for the testator's agreement not to require payment until after six months' notice, and that the plea was not supported.

¹ 23 Law J. Rep. (N. S.) Exch. 118; 9 Exchequer Rep. 544; 2 Com. Law Rep. 480.

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THIS was an action for money payable by the defendant to J. Alston, in his lifetime, for money lent to the defendant, and for interest on money owing by the defendant to the plaintiff, and on accounts stated.

Pleas — First, except as to so much of the declaration as relates to the causes of action in the introductory part of the last plea mentioned, never indebted; thirdly, as to money lent and money due on accounts stated, that originally no interest was payable to J. Alston, but that afterwards it was agreed that the defendant should pay interest, and should not be required to pay the principal until the expiration of six months' notice by J. Alston requiring payment thereof, and that time should be given to the defendant for the payment until the expiration of the said six months; that no such notice had been given, and that Alston accepted the said agreement in satisfaction of the causes of action in the introductory part of this plea mentioned. Issue thereon.

At the trial, before Martin, B., at the London Sittings in Michaelmas term last, the facts were these: — The plaintiffs were the executors of James Alston, formerly a merchant in London, and the defendant was a merchant at St. Ubes, in Portugal. The defendant being indebted to the testator, came over to England, and whilst he was here, a balance was struck between the parties in January, 1847, of which transaction the following memorandum appeared in the handwriting of the testator:—

	£	s.	d.
" Balance	749	8	7
	464	16	6
	<hr/>		
	£284	12	1

Mr. Galloway agreed to pay me this sum as a compromise for all accounts in the course of this year, 1847."

The testator afterwards wrote to the defendant the following letter:

" 30th January, 1847.

" Mr. Galloway, — I have thought it might be satisfactory to you that I should commit to writing the purport of the arrangement made on Thursday last, as I understood it to be —

	£	s.	d.
" Balance as by my book	749	8	7
Deductions allowed	464	16	6
	<hr/>		
	£284	12	1

The balance settled as due by you to me, payable in the course of the present year without interest; and if this statement accords with the memorandum you made, perhaps you would be kind enough to state your conformity."

The money was not paid in 1847.

On the 3d of July, 1848, the testator wrote the following letter to the defendant:

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"London, 3d of July, 1848.

"My dear Sir, — Mr. Beavan informs me that in consequence of the late commercial pressure on the money market, it is not convenient for you to pay me the sum agreed upon, 284*l.* 12*s.* 1*d.*, at Christmas last. I do not wish to press you, and you can retain the money on allowing me interest from the 1st of January last, at the rate of 5*l.*, payable by Alston, Beavan & Co., half yearly; and the first half year's instalment or interest falls due on the 30th of June last, and the second on the 31st of December next. This can continue until you find it convenient to pay the money, or by my giving you six months' notice should I require the money."

The defendant, on the 7th of August, wrote to the testator as follows: —

"My dear Sir, — I am in receipt of your note of the 3d of July, and I consider your request just that I should allow you interest on the amount I agreed to allow when in England, which shall be paid you as you request, so long as I retain the amount on the terms of your proposition, six months' notice upon withdrawal. Believe me, yours very truly,

"J. M. GALLOWAY.

"St. Ubes, 7th of August, 1848."

On the part of the plaintiffs, evidence was given of an usage to pay interest after the rate of 3*l.* per cent. on the settled balance of merchants' accounts.

For the plaintiffs, it was submitted that the third plea was not proved, and that there was no consideration for the agreement there stated, seeing that the defendant, in support of that plea, was bound to prove that interest was not payable by him previously to the making of the agreement, whereas there was proof both of an usage to pay interest on a balance, and of an agreement to that effect. The learned judge was of opinion that there was no consideration for the agreement, and directed a verdict for the plaintiffs, reserving leave to the defendant to move to enter a verdict for him.

A rule *nisi* was obtained accordingly, against which —

Crowder, (*Bridge* with him,) showed cause. There was no consideration for the agreement set forth in this plea, for in order to make the plea good, the defendant should have shown affirmatively that no interest was payable on the balance struck between the parties; whereas, the very terms in which the balance was struck show that the debt was payable without interest only during the year 1847, and not having been paid then, that interest re-attached. The letters of the 3d of July and the 7th of August show that interest had been payable before the making of the agreement stated in the 3d plea. The mercantile usage was also to the same effect, and independently of that circumstance, interest would have been payable by the 3 & 4 Will. 4, c. 42, s. 28. He referred to *Belshaw v. Bush*, 22 Law J. Rep. (n. s.) C. P. 24; s. c. 14 Eng. Rep. 269. (He was then stopped by the court.)

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Watson and *Cleasby*, in support of the rule. The contract made between the parties on the striking of a balance was not to the effect that interest should be paid after the 1st of January.

[PARKE, B. If the debt was not to bear interest after the 1st of January, 1848, there would be a consideration for the agreement stated in the plea. The defendant was bound to show that the debt did not bear interest.]

There was a compromise between the parties, and no interest was to be paid. There is no contract either express or implied on the part of the defendant to pay interest.

[PARKE, B. Evidence was given of an usage that the defendant was to pay interest.]

The testator considered that he was to receive the sum of 284l 12s. 1d. and no more.

[PARKE, B. The plea states that no interest was to be paid, and in order to establish the plea the defendant must show that at the time of the second contract no interest was payable. The meaning of the testator's letter is, that if the debt was paid in the year 1847, it should be paid without interest. The interest was payable at the time of the contract stated in the plea, and, therefore, there is no consideration for that contract. The case would have been different if either interest had not been payable, or there had been a dispute about the amount of interest. The very documents put in by the defendant show that interest was payable at the time of the contract, and, therefore, there was no consideration for that contract. The plea is negatived, and, I think, does not admit of amendment.]

Is the allegation of no interest being due material?

[PARKE, B. Yes; because without such allegation there is no consideration. He mentioned *Ford v. Beech*, 11 Q. B. Rep. 852.]

The case stood over till the following day, to allow the defendant to amend the plea, which he then proposed to do by striking out the averment that "originally no interest was payable," and stating, as a consideration for the testator's agreement, that the defendant agreed to pay interest every six months.

Sed per Curiam.¹ This amendment ought not to be made, as it is not in accordance with the facts. The rule must be discharged.

Rule discharged.

¹ PARKE, B., ALDERSON, B., PLATT, B., and MARTIN, B.

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HOLLAND and others v. LEA and others.¹

January 31, 1854.

Bond — Assistant Overseers — Election by Vestry — Appointment by Justices.

By a resolution of a vestry duly held on the 27th of March, 1845, R. L. was nominated and elected assistant overseer, the salary being understood to be 27*l.* a year with extras, but the resolution did not specify the salary. On the 25th of April, 1845, two sureties were proposed to the vestry and accepted, and, on the 9th of May they executed the usual bond for the faithful performance by R. L. of his duties as assistant overseer. On the 19th of March, 1846, the vestry resolved "that the permanent overseer's salary," meaning the salary of R. L. should be raised from 27*l.* to 35*l.* a year, including all other extras. On the 25th of June, 1846, two justices signed the warrant of appointment, which recited that R. L. had been appointed on the 19th of March, 1846:—

Held, per Pollock, C. B., Parke, B., and Alderson, B., that R. L. was not duly appointed assistant overseer, no appointment having been made pursuant to the resolution of the 27th of March, 1845, and therefore the sureties were not liable for his breach of the conditions of the bond—Martin, B., *dissentiente*.

THIS was an action by the plaintiffs, as churchwardens and overseers for the time being of the parish of Whittington, in the county of Salop, against the defendant, Richard Lea and the other two defendants, his sureties, on a bond given to the churchwardens and overseers for the time being of the said parish, dated the 9th of May, 1845.

The declaration, after stating the bond in the usual form, set out the conditions at length.

After reciting the 59 Geo. 3, c. 12, s. 7,² as to the election of assistant overseers, and that at a vestry meeting of the parish, held on the 27th of March, 1845, Richard Lee had been duly nominated and elected overseer, at a salary of 27*l.* a year, and that the inhabitants required him, with two sufficient sureties, to enter into a bond for the faithful performance of his duty; and that the other two defendants had consented to become, and were accepted as sureties, the condition was declared to be that if Richard Lea should from time to time, and at all times during the continuance of the office of assistant overseer, duly and faithfully collect and pay over, and duly account for the amount of all rates received by him, and perform the other duties of the office, the bond should be void. The declaration then proceeded to aver that, although Richard Lea was duly appointed assistant overseer, and was and remained such assistant overseer, duly appointed for a long time, yet after his appointment he committed various breaches of the conditions of the bond. The defendant, Richard Lea, suffered judgment by default, the other two defendants pleaded "that Richard Lea was not duly appointed, nor did he

¹ 23 Law J. Rep. (N. S.) Exch. 122; 9 Exchequer Rep. 430.

² See the section at length in the judgment of Martin, B.

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remain overseer in the manner and form as in the declaration is alleged."

At the trial, before Martin, B., at the Sittings after Trinity term, 1853, the following facts were admitted to be proved. Upon the 27th of March, 1845, at a vestry of the parish duly held, Richard Lea was nominated and elected assistant overseer, in the room of one Mr. Venables, deceased; and it was understood, although not mentioned in the minutes of the vestry, that the salary was to be 27*l.* a year, with certain extras. On the 25th of April, 1845, having been required to provide sureties, he proposed to the vestry the other two defendants to become such, and they were accepted. On the 9th of May, he and they duly executed the bond which is declared upon in the present action. Richard Lea then proceeded to collect the rates and perform all the other duties of the office of assistant overseer. No warrant of appointment was made by two justices until the 25th of June, 1846. In the meantime, at a vestry held on the 19th of March, 1846, a resolution was come to in the words following:—"That the permanent overseer's salary" (meaning Richard Lea's,) "should be raised from 27*l.* to 35*l.* a year, including all other extra charges." On the 25th of June, 1846, two justices signed the following warrant of appointment:—

"Whereas, the inhabitants of the parish of Whittington, in the county of Salop, in vestry assembled, in the said parish, on the 19th day of March 1846, did nominate and elect Richard Lea, of the said parish of Whittington, to be assistant overseer of the poor of the said parish of Whittington, and did determine that he should collect the rates, make out the poor-rate assessments, and execute and perform all the duties of the office of an overseer of the poor of the said parish, and did fix the yearly sum of 35*l.* as and for the salary of the said Richard Lea, for the execution of the said office. Now we, two of her Majesty's justices of the peace, in and for the said county of Salop, in pursuance of the said statute in such case made and provided, do hereby appoint the said Richard Lea to be an assistant overseer of the poor of the said parish of Whittington. And we do hereby authorize and empower him to execute and perform the said duties, and to receive the salary so as aforesaid fixed by the said inhabitants in their said vestry. Given under our hands and seals this 25th day of June, 1846. Signed," &c.

Subsequent to June, 1846, Richard Lea acted for several years as assistant overseer, and had become a defaulter during that period to a considerable amount. On these facts, it was suggested by the learned counsel for the defendants, John and Samuel Lea, that they were entitled to have the issue on the above plea found for them. His lordship directed the verdict to be entered for the plaintiffs, giving the defendants leave to move to enter the verdict for them, if the court thought them so entitled. A rule was subsequently obtained for this purpose, against which—

Keating and *Raymond* showed cause on the 23d of November; and

Watson and *Thrupp* were heard in support of the rule. *Lord Ar-*

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Kington v. Merrick, 2 Wms. Saund. 415 *b*, and *Frank v. Edwards*, 8 Exch. Rep. 214, s. c. 16 Eng. Rep. 477, were cited.

The arguments on both sides are fully stated in the judgments, which were now (Jan. 31) delivered as follows.

MARTIN, B. [After stating the pleadings and the facts, his lordship continued:] The argument upon the part of the defendants was, that the liability of the sureties depended upon the nomination and election of Richard Lea as assistant overseer in March, 1845, and that unless his appointment by two justices was in pursuance of that election and nomination, Richard Lea was never such an officer as the other two defendants became responsible for; that they were only liable in respect of defaults by him as an officer whose office was inchoate at the time of the execution of the bond; that the election of 1845 was applicable to the salary of 27*l.*, and which was abrogated and annulled by what took place in 1846, which was in substance a new election; and that the appointment of the justices was made in express terms upon such nomination and election. It was agreed on behalf of the plaintiffs, that in order to render the defendants responsible on the bond, it was essential that Richard Lea should, at the time of the default, be assistant overseer by virtue of his election in 1845, and that his office was then inchoate; but it was argued that the above contention, on the behalf of the defendants, was grounded upon a fallacy, and that in reality and truth, there was no nomination or election of Richard Lea as overseer in 1846; that his real and only nomination and election was in 1845, and that what occurred in 1846 was the mere raising of his salary, and there was neither resignation of the office by him nor a revocation of it by the parish. *Frank v. Edwards* was cited as an authority, as alleged by the counsel for the plaintiffs, in point. It was further contended, if that this were so, the false recital of the warrant of the justices was of no consequence and did not affect the appointment. In my opinion, the latter argument is the correct one.

The statute 59 Geo. 3, c. 12, under which the bond was taken, enacts, "That it shall be lawful for the inhabitants of any parish in vestry assembled to nominate and elect any discreet person or persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by him or them executed and performed, and to fix such yearly salary for the execution of the said office as shall by such inhabitants in vestry be thought fit; and it shall be lawful for any two of his Majesty's justices of the peace, and they are hereby empowered, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor for such purposes, and with such salary as shall have been fixed by the inhabitants in vestry; and such salary shall be paid out of the money raised for the relief of the poor, at such times and in such manner as shall have been agreed upon between the inhabitants in vestry and the respective persons so to be appointed; and every person to be so appointed assistant overseer shall be and he is hereby

authorized and empowered to execute all such of the duties of the office of overseer of the poor as shall in the warrant of his appointment be expressed, in like manner and as fully to all intents and purposes as the same may be executed by any ordinary overseer of the poor; and every person or persons so appointed shall continue to be an assistant overseer of the poor until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer; and it shall be lawful for the inhabitants of any parish upon the nomination and election by them of an assistant overseer or overseers, to require and take security for the faithful execution of his or their office by bond with or without surety or sureties, and in such penalty as they shall think fit; and every such bond shall be made to the churchwardens and overseers of the poor, and may, on any breach of the condition thereof, be put in suit by and in the names of the churchwardens and overseers of the poor for the time being, by the direction of the vestry or select vestry, for the benefit of the parish, in the manner hereinafter provided." In the present case the nomination and election of the assistant overseer took place in March 1845; the bond in question was taken upon that nomination and election in strict conformity with the directions of the statute. It is expressly enacted that it is upon the nomination and election of the vestry, and not upon the appointment of the justices, that the bond is to be taken: the appointment is to be a thing done subsequently.

The question arises, whether there was any nomination or election of Richard Lea to be assistant overseer either in fact or law, other than that which took place in March, 1845. I am of opinion there was not. That which took place in March, 1846, entered in the minutes of the vestry, that the assistant overseer's (there called the permanent overseer's) salary should be raised from 27*l.* to 35*l.*, as it seems to me, by this resolution, treats the office of assistant overseer as full, and Richard Lea as the overseer; and it was never contemplated by any one that Richard Lea either resigned the benefit of the election in the previous year or that the inhabitants understood him to do so, or themselves to revoke his appointment. On the contrary, I think they adopted his election in March, 1845, and merely did what they in terms professed to do, raised the salary from 27*l.* to 35*l.* I am clearly of opinion there was in point of fact no nomination and election in March, 1846. I am of opinion that what took place did not amount to that nomination and election in point of law.

It seems to me *Frank v. Edwards* is a direct authority for this view. In that case, the assistant overseer was nominated and elected, and the salary fixed at 16*l.* a year; on his nomination and election an appointment was made by the justices, a bond executed by the sureties: the duties being afterwards lessened, he agreed with the vestry to continue an officer at a salary of 14*l.*, and after that time became a defaulter. It was held by the court, that the reduction of the salary did not amount to a resignation or revocation of the office, and that the existing overseer continued an officer under the original election, and, although with a new salary, his sureties' liability still

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continued, and was not discharged. Parke B., in delivering the judgment of the court, said — "The condition of the bond does not contain any stipulation by which the sureties are to be exempted from their liability under the bond, in case there shall be a reduction in the salary. If the sureties had thought that the amount of the salary was an essential ingredient in the contract, they ought to have taken care to have had a stipulation inserted in the condition of the bond, that they would be liable only so long as the overseer was continued at the same salary. That they have not done; and it therefore follows, that the assistant overseer still continued in his office under the old appointment, but at a reduced salary." They were, therefore, liable, notwithstanding the salary was reduced. I think the reasons for that judgment correct; and it seems to me absurd to suppose there is any distinction between the fact of reducing the salary and raising it. This case is conclusive.

The real status of Richard Lea in March, 1846, was this: *videlicet*, he was assistant overseer, duly nominated and elected at a vestry meeting of the 27th of March, 1845, with a then stipulated salary of 27*l.* in the place of 35*l.* by virtue of the resolution of the vestry of the 19th of March, 1846; and that this increase of salary did not affect the liability of the defendants. If I am right in this, the only question that remains is as to the operation, which is a false recital or misrecital in the appointment of the justices. There is nothing in the act to prescribe the time at which the appointment is to be made; that appointment is to be of the person nominated and elected by the inhabitants at such salary as they fix. As I have already said, in my opinion, at the time the bond was executed Richard Lea was nominated and appointed in March, 1845, with a salary increased by them in March 1846, and it was a mistake in the warrant of appointment when they stated that he was nominated and elected in March 1846, he having in reality been elected in March 1845, and only the salary increased in 1846, and that this is of no consequence upon the principle of *utile per inutile non vitiatur*; and I think he was rightly appointed assistant overseer by the appointment in question, the appointment being perfectly good if this part of the resolution were struck out. For these reasons I am of opinion the issue should be found for the plaintiff, *videlicet*, the issue that Richard Lea was appointed and did remain as elected; and I think that the plaintiffs are entitled to retain the verdict, and that this rule should be discharged.

ALDERSON, B. I entertain a different opinion. It seems to me that the true construction of the 59 Geo. 3, c. 12, is quite different from that which my brother Martin points out. I think the meaning of the 59 Geo. 3, c. 12, is to create a particularly specified office, and the only office which the justices under that section could appoint to is an office which, by the act, has certain duties affixed to it and a certain salary appointed to it. Both are parts of the office. The inhabitants in vestry are bound to appoint the duties and to fix the salary, and the justices can only appoint an officer with those fixed duties and that fixed salary. Here the inhabitants appointed an

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officer with certain fixed duties in the vestry, and they appointed a certain fixed salary; the bond then is given for the discharge of the duties of the overseer thus constituted, and after this the inhabitants in vestry chose to alter the salary. I think therein they have made a new office, and that to this new office, and to this alone, it is that the justices have appointed the overseer. The bond, therefore, was not given in my opinion, for the due discharge of the duties of this office, but of another; and, therefore, although the party has not discharged the duties, his sureties are not liable.

POLLOCK, C. B. I have to deliver the opinion which my brother Parke and myself entertain upon this subject. We are of opinion that the issue of "no appointment" ought to be found for the defendants. The argument for the defendants was that, according to that true construction of the condition of the bond, the sureties were responsible only for the performance of the duties of assistant overseer after his appointment by the justices, by virtue of the resolution in vestry held on the 27th of March, 1845, recited in the bond, and during the continuance of the office to which he should be so appointed; and that the evidence showed that no appointment was made pursuant to that resolution, and we are of opinion that that argument was correct. To render the bond valid, so as to entitle the plaintiffs or succeeding overseers to sue upon it, it must be made according to the statute; and the provisions of the statute are clear, that the vestry may require sureties for the faithful discharge of the duties of the office to which he may be afterwards appointed, and that is, the nature of the bond which may be put in suit by the succeeding churchwardens. By the resolutions of the vestry of the 27th of March, 1845, Richard Lea was nominated at a salary of 27l. a year. The vestry required sureties for the performance of those duties, which could only be duties imposed upon him after his appointment by the justices and pursuant to the nomination. The duties are required to be specified in the warrant of appointment, which is to be made, and the salary, also, is to be fixed; and the appointment by the magistrates is to have respect both to the duties and to the salary, and apparently the magistrates are to exercise a certain degree of control. The magistrates are to exercise some discretion whether they will make the appointment or not. They cannot alter the salary. They may say, "This is an inadequate salary, and we will not make this appointment;" or they may say, "This is an excessive salary, and we think the appointment ought not to be made with this salary." They have no other power but to refuse or to consent. The condition of the bond, so as to cause it lawfully to be put in suit by succeeding churchwardens, must be according to the statute, and must be construed with reference to the statute, and read as if it were for the faithful performance of the duties of the office according to the appointment to be made pursuant to the resolution of March, 1845.

Now, the objection is, that no appointment was ever made pursuant to that resolution and nomination, and, consequently, that the

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office, for the due execution of which the bond was given and the sureties became responsible, never existed. It seems to us to be clear that the justices, in making the appointment of the 25th of June, 1846, did not mean to act upon the nomination of March, 1845, and, consequently, the recital of an appointment in 1846 cannot possibly be considered as a mistake for that of March, 1845; and that the issue that no appointment was duly made, which must mean according to the resolution of March, 1845, in respect of which the bond was given, must be found for the defendants. The rule, therefore, will be made absolute.

PARKE, B. I agree in this judgment. We have communicated together, and have assigned our joint reasons for that opinion.

Rule absolute.

JAMES v. COCHRANE and another.¹

February 4, 1854.

Bail in Error — Common Law Procedure Act — Plaintiff in Error and Plaintiff below.

A plaintiff in error who is also plaintiff below is not bound, under the 151st section of the Common Law Procedure Act, to give bail in error, the law as to that point established by preceding statutes not having been altered by that section.

THIS was a rule calling upon the defendants to show cause why a writ of *fi. fa.* issued by them should not be set aside, under these circumstances. Judgment having been given for the defendants, the plaintiff brought a writ of error, without entering into any recognizance of bail in error, whereupon the defendants issued execution, on the ground that according to the terms of the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 151,² a writ of error did not amount to a stay of proceedings, unless bail in error were given.

Manisty showed cause. The question in this case is, whether

¹ 23 Law J. Rep. (N. S.) Exch. 126; 9 Exchequer Rep. 552.

² That section enacts that every person suing out a writ of error, "shall within four clear days after lodging the memorandum alleging error, or after the signing of the judgment, which ever shall last happen, or before execution is executed, be bound as to the party for whom any such judgment is or shall be given by recognizance, to be acknowledged in the same court, in double the sum adjudged to be recovered by the said judgment, (except in case of a penalty, and in case of a penalty, in double the sum really due, and double the costs,) to prosecute the proceedings in error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the proceedings in error be discontinued by the plaintiff therein) all and singular the sum or sums of money and costs adjudged, or to be adjudged, upon the former judgment, and all costs and damages to be also awarded for the delaying of execution."

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execution may issue against a plaintiff in error, who is also the plaintiff below, in a case where he has not given bail in error, pursuant to the 151st section of the Common Law Procedure Act, 15 & 16 Vict. c. 76. Without doubt, before the passing of that act, no bail in error, in circumstances like the present, was necessary to be given under the 3 Jac. 1, c. 8, or the 6 Geo. 4, c. 96. In the former statute, the words are, that no execution shall be stayed by a writ of error, unless the party suing out such writ of error shall be bound "in double the sum adjudged to be recovered by the former judgment." That language, it must be admitted, does not apply to those who are plaintiffs both above and below. But the language of the 151st section of the Common Law Procedure Act is different; for there the party suing out the writ of error, is to be bound in a recognizance to pay "all and singular the sum or sums of money and costs adjudged upon the former judgment." That language makes it incumbent on the plaintiff in error, being also plaintiff below, to give bail in error for the purpose of securing costs to the defendant.

[PARKE, B. But for the concluding terms of that section of the Common Law Procedure Act, there would be no difficulty whatever in the case.]

PLATT, B. Surely the object of these provisions as to bail in error, is to protect creditors, and nothing else.]

Why should a creditor have more protection than a defendant who may be harrassed by litigation, when in truth there exists no ground of action whatever against him? The 151st section was intended to provide for the case of a man who has been made a defendant in an action, and who discovers at last, when his case has been carried into the House of Lords, that the plaintiff is insolvent. He referred to *Freeman v. Garden*, 1 Dowl. & Ry. 184.

Atherton, for the plaintiff, in support of the rule. The execution is bad, for the plaintiff in error in this case was not bound to give bail in error. The difference between the Common Law Procedure Act and the statute of James is, that the words "sum or sums of money and costs," are substituted for "debts, damages, and costs." The preamble of the 3 Jac. 1, c. 13, states, "that subjects are now more commonly withholden from their just debts, and often in danger to lose the same by means of writs of error, which are now more commonly sued than heretofore they have been." That only applies to cases where defendants below became plaintiffs in error, and not to the present case. The very form of the recognizance, which has not been altered, shows this. The substance of the recognizance, is set out in the late act. The Common Law Procedure Act was intended not to alter the law, but only the mode of procedure.

[MARTIN, B. The 208th section of the Common Law Procedure Act throws much light upon this point.]

PLATT, B. If the Common Law Procedure Act, as to this part of it, were intended to apply to those who were plaintiffs both below

and above, why were not the same provisions extended to claimants in ejectment under the 208th section ?]

That argument is unanswerable.

Cur. adv. vult.

The judgment of the court¹ was now delivered by —

PARKE, B. This is a question whether bail in error is to be given by a plaintiff who is bringing a writ of error to reverse a judgment for the defendant for costs. We think upon the true construction of the 151st section of the Common Law Procedure Act, that it is not meant to alter the law of all the preceding statutes, in which it is invariably the case that statutes requiring the bail in error, do not apply to the case where the plaintiff in error brings the action, and they have adopted, in the conclusion of this section, the words which are applicable only to the case of the defendant below: "No execution is to be stayed unless the party be bound unto the party for whom any judgment is or shall be given by recognizance, to be acknowledged in the same court in double the sum adjudged to be recovered by the said judgment, except in case of a penalty, and in case of a penalty in double the sum really due" — (there the stop ought to have been placed) — "and double the costs." That applies only to the case in which there is judgment for the sum recovered, and also for the costs; "to prosecute the proceedings in error with effect;" that can only be the judgment for the plaintiff; "and also to satisfy and pay (if the said judgment be affirmed or the proceedings in error be discontinued by the plaintiff therein) all and singular the sum or sums of money and costs adjudged or to be adjudged upon the former judgment;" that can only be in the case of the plaintiff where the sum recovered is adjudged to be recovered, and also the costs. That is applicable to the case of the defendant. We think that although the commencement of the section is general, "any judgment hereafter to be given," the context shows that it is only to be applied to some cases in which the statutes requiring bail in error are provided for. The rule, therefore, will be absolute to set aside the *fieri facias*. I may observe that Mr. Wise, in his work on the Common Law Procedure Act, observing upon this section, says, that in his opinion it is not to be construed as extending to the plaintiff in writs of error at all. I concur in that opinion. There will be no costs, because there was sufficient doubt about it to make it right to apply to the court.

Rule absolute, without costs.

¹ PARKE, B., ALDERSON, B., PLATT, B., and MARTIN, B.

*

Bracegirdle v. Hincks.

BRACEGIRDLE v. HINCKS. *

January 27, 1854.

Debt — Carriage of Goods.

An action of debt is not maintainable upon an agreement that the defendant would carry certain goods for the plaintiff, in consideration that the plaintiff would carry a like quantity for the defendant.

THE declaration stated that the defendant was indebted to the plaintiff for the carriage of timber, and upon an account stated.

Plea — Never indebted.

At the trial, before the under-sheriff of Middlesex, it appeared that there had been an agreement between the plaintiff and the defendant, that the plaintiff would carry a certain quantity of timber from Alton to Derby for the defendant, and that the defendant would carry a certain quantity of timber from another place to Derby for the plaintiff. The plaintiff carried the timber for the defendant, but the defendant not having performed his part of the agreement this action was brought. It being objected that the plaintiff could not recover, because no promise to pay in money was proved, a verdict was found for the plaintiff, and leave reserved to move to enter a nonsuit.

J. Addison obtained a rule accordingly, and cited *Harrison v. Luke*, 14 Mee. & W. 139.

Lush now showed cause. The defendant has broken his contract, and the plaintiff is entitled to be paid for the value of the work done. There is no authority that the claim is not recoverable in the present form. In *Harrison v. Luke*, a contract for the exchange of goods was held not to support a count for goods sold, but an exchange is altogether different from a sale.

Addison was not called on to support the rule.

PARKE, B. The defendant never was indebted to the plaintiff for money, and the action is not maintainable. It is the same in principle as the case cited of a contract of exchange.

POLLOCK, C. B., ALDERSON, B., and MARTIN, B., concurred.

Rule absolute.

¹ 23 Law J. Rep. (N. S.) Exch. 128; 18 Jur. 70; 9 Exch. Rep. 361.

Figg v. Wilkinson.

COUNTY COURT APPEAL.

Figg, Appellant, v. WILKINSON, Respondent.¹

January 11, 1854.

County Court Appeal—Signing and Sealing Case—Assent of Party to signing Nunc pro Tunc.

A county court judge, after settling a draft case for an appeal, signed it on the understanding that the plaintiff was to furnish to the defendant, the appellant, a copy of a certain document, which was to be set out in the case, and that then the judge would sign the fair copy of the case. The draft case was also sealed with the seal of the county court. Three days afterwards the plaintiff sent the document to the defendant, who immediately inserted it in the case and sent two copies of the complete case to the rule office of this court within three days from the day that he had got the document and perfected the case, but more than three days after the draft case had been signed. The judge, when applied to, refused to sign the fair case, thinking that he had no power to do so, and the appellant thereupon entered the draft case signed by the judge, with the document appended to it, as the case to be heard on appeal. The respondent contended that the court had no jurisdiction to hear the appeal, on the ground that if the draft case were considered the case the copies had not been sent to the rule office within three days, pursuant to rule 163 of the New County Court Rules, and that there was no signed case at all unless the signed draft case were the case:—

Held, that, as the respondent had assented to the judge's signing the draft case provisionally, the case as against him was not to be considered as signed and sealed until the day on which the document was inserted; and that, as on that view the service of the copies was in due time, the court had jurisdiction to hear the appeal.

A MOTION was made last term in this case, which was a county court appeal, to strike it out on the ground that this court had no jurisdiction to entertain it.

The defendant, Figg, appealed against the decision of the judge in favor of the plaintiff, Wilkinson, in an action for breach of warranty of a horse, and on the 1st of July presented to the judge a draft case for him to settle. The parties not agreeing in their statement, the judge then settled it, but directed that a copy of a certain document in the plaintiff's possession should be set out in it; and he then signed the draft case, and it was then sealed with the seal of the court, on the understanding that the plaintiff should furnish the defendant with a copy of the document, that it should be inserted in the case, and that after that had been done the judge should sign a fair copy of the whole case, which he promised to do. It was not until the 4th of July that the plaintiff furnished the defendant with the document required. The latter prepared the case immediately, inserting the document, and a copy of it was deposited with the clerk of the county court on the 4th of July. In a day or two after the defendant presented it again to the judge for signature, according to the arrangement. The latter, however, then refused to sign it,

¹ 23 Law J. Rep. (N. S.) Exch. 129; 9 Exchequer Rep. 475. Before POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

Figg v. Wilkinson.

saying that whatever he might have proposed to do before, he then considered himself *functus officio* by having signed the draft case. The defendant thereupon entered the draft case already signed, with the document appended to it, (which bore the seal of the county court when produced in court,) as the case for the appeal. Two copies of the case containing the document were transmitted to the rule office of the court on the 6th of July. •

The case was argued on the 14th of November, 1853, and the court expressed an opinion that the county court judge ought to have signed the perfect case, and the rule was enlarged to give time for an application to him to sign the case, which it was presumed that he would do, according to the intimation from the court.¹ The motion now, however, came on again for argument before the court, as the county court judge, notwithstanding the direction of this court, had still declined to sign any other case.

Bramwell showed cause. The objection is, that two copies of the case were not transmitted to the rule office within three days after the case was signed, pursuant to rule 163 of the New County Court Rules of Practice. It is true that the copies were not sent within three days from the time the case was signed if the 1st of July is to be counted as the day on which the judge's signature was affixed; but they were sent in due time if the time runs from the 4th of July, the day on which the case was completed by the insertion of the document.

[PARKE, B. The case is to be settled by the county court judge. He did not settle it on the 1st of July. He left a blank to be filled up.]

Yes, there was no case at all until that blank was filled up. The judge only signed it provisionally. It was not, in substance, signed and sealed until the 4th of July.

Cripps. The case ought to be struck out. The rules of practice are as obligatory as an act of parliament. Rule 163 was not complied with, for two copies of the case were not sent to the office within three days after the judge's signing it, for it was signed on the 1st, and the copies not transmitted until the 6th of July. •

[PARKE, B. The judge signed it on the 1st, *de bene esse*, with the understanding that it was not to be a complete case until the document was added.]

The case was either signed on the 1st of July, or there was no signed case at all. On either view the court has no jurisdiction to hear the appeal.

POLLOCK, C. B. I am of opinion that this rule must be discharged, with costs; and the more especially so as the rule was moved with costs. Mr. Cripps tries to put the other side on the horns of a

¹ See the report, ante p. 411.

Metzner v. Bolton.

dilemma, for he says that the case either was signed on the 1st of July, or was not signed at all. But that is not the only way of looking at the facts. No doubt the judge signed the case manually on the 1st of July, but he did so with a perfect understanding, to which the plaintiff was a party, that there remained something to be done, and that until that was done the signing and sealing were not to be considered complete. What was to be done was the insertion of the document, and that was not done until the 4th of July. The ground on which I think the rule ought to be discharged is, that the plaintiff was a party to the whole proceeding. He consented to the matter standing over until the document was inserted. He impliedly consented, therefore, to all that was necessary to give effect to what was apparently the intention of the parties at the time. For this reason it appears to me that it is not in accordance with a right view of the transaction that the plaintiff should be permitted to make this objection.

PARKE, B. I think that the plaintiff in this case, by the course which he took, has admitted that the case was not to be considered as complete until the 4th of July, and he agreed that the signature was not to operate until the case was complete. If so, all the proceedings were in time.

ALDERSON, B., concurred.

MARTIN, B. I am of the same opinion. What the judge did in signing the case was merely signing it *de bene esse* until it was perfected by the insertion of the document. That document passed through the hands of the court and has the seal of the court on it. The case appears to have been perfected on the 4th of July.

*Rule discharged.*¹

METZNER v. BOLTON.²

January 17, 1854.

Amendment—Variance—Contract, Statement of—Usage of Trade.

The declaration stated that the plaintiff entered into the service of the defendant as a commercial traveller at a yearly salary, and that the defendant agreed to continue him in his employ for a whole year, and then alleged that the defendant discharged him. It was proved that there was a usage in the trade that commercial travellers should be dismissed with a three months' notice:—

¹ The court, on a subsequent day, heard the appeal, and directed a nonsuit to be entered in the cause.

² 23 Law J. Rep. (N. S.) Exch. 130; 9 Exch. Rep. 518.

Metzner v. Bolton.

Held, that the contract was not proved, the condition as to the notice not being in defence of the contract, but forming part of it; but that the plaintiff ought to have been allowed to amend at the trial, without costs.

THE declaration stated that the plaintiff, on the 1st of January, 1853, entered into the service of the defendant as a commercial traveller at a yearly salary, and that the defendant agreed to continue him in his employ for a whole year. That the plaintiff continued in such service till the 31st of March, 1853, when the defendant discharged him.

The defendant pleaded *non assumpsit* and other pleas.

At the trial, before Martin, B., at the London Sittings after Trinity term last, the following facts appeared: — The plaintiff was employed by the defendant in January, 1853, as a commercial traveller, at a yearly salary of 140*l.*, and continued in his service until the March following, when the defendant discharged him. It appeared that there was a usage in the trade that commercial travellers should be dismissed with three months' notice. It was thereupon objected for the defendant, that the contract had not been proved; and that there was a variance between the statement in the declaration and the proof. The learned judge overruled the objection, and the plaintiff had a verdict, damages 56*l.*

Jones having in Michaelmas term obtained a rule *nisi* for a new trial on the ground of misdirection, —

Prentice showed cause. It was not necessary in this case to state that the contract was determinable by a three months' notice to quit. The rule applicable to this subject is, that if there is a subsequent proviso not referred to by the contract it need not be noticed by the plaintiff, but must be pleaded by the defendant. This resembles the case of a proviso in a deed. Take the case of a tenancy from year to year, which may be determined by a six months' notice to quit. The fact of the notice is not mentioned in pleading. A personal contract determines by the death of the party, but the pleader does not aver that the party is still in full life. The rule is thus stated in 1 Chit. Plead. 246, 4th edit. 1844, that wherever there is a circumstance, the omission of which is to defeat the plaintiff's right of action *prima facie* well founded, whether called by the name of a proviso or a condition subsequent, it must in its nature be a matter of defence, and ought to be shown in pleading by the opposite party. The rule is stated by Lord Tenterden, C. J., in *Vavasour v. Ormrod*, 6 B. & C. 430. If the law raises an exception to a general right, it need not be stated in pleading. If this proviso had been pleaded, it would have amounted to the general issue.

[PARKE, B. The rule as to this point is explained by Maule, J., in *Sharland v. Leifchild*, 4 Com. B. Rep. 529.]

Smart v. Hyde, 8 Mee. & W. 723; *Weedon v. Woodbridge*, 13 Q. B. Rep. 462; and *Clarke v. Gray*, 6 East, 564, are in point.

Jones, contra, in support of the rule. The plea of three months'

Number 2. Bona.

SECTION 1000. THE JUDICIAL POWER. The doctrine of *non assumpsit* does not apply to party contracts. It may be admitted that a plea setting up as an answer a term of a contract quite independent of the contract declared on would be bad as amounting to the general issue. *Nash v. Brown*, 11 Me. & W. 212. That, however, is not the present case. In *Sturges v. Leake* the plea was held to be bad on the ground of its qualifying the contract. *Barter v. Nunn*, 13 Law J. Rep. (N. S.) C. P. 52. The section which ought to be pleaded is consistent with the statement in the declaration, that the plaintiff was to serve for a year.

(Mr. Justice Bull.)

The judgment of the court' was now delivered by —

PARKE, B. In this case the declaration stated that the plaintiff had engaged himself as a commercial traveller with the defendant, a straw bonnet manufacturer, to travel for one year, and that he was wrongfully dismissed. The only plea was *non assumpsit*. At the trial, it appeared that the plaintiff had been engaged for a year and had been wrongfully dismissed; but on cross-examination the plaintiff admitted there was a usage in the trade to dismiss with three months' notice. My brother Martin thought that the agreement being for the plaintiff's service for a year, the contract was proved. We are of opinion that this ruling cannot be supported. A usage is tacitly annexed to the contract unless excluded by the terms; and the question is, whether, in the present form of action, it must be stated. In the case of an instrument under seal, no doubt the plaintiff may plead only so much as is necessary for his case, and the defendant must set up any proviso of which he wishes to avail himself. 1 Wms. Bound. 233, n. 2. So, where an estate is vested, and is to be defeated by matter *ex post facto* or condition subsequent, the plaintiff may declare generally without showing performance thereof. *Ughtred's case*, 7 Rep. 69. But here the condition imputed by the custom is not in defeasance of the contract, but is part of the contract. It is not true, as alleged, that the defendant engaged the plaintiff for a year, with a power in the defendant to dismiss him upon giving three months' notice. The shorter mode of statement cannot exonerate the plaintiff from stating the full contract correctly. My brother Martin is not quite satisfied with this judgment; but such being the opinion of the majority of the court, the rule must be absolute for a new trial.

ALDERSON, B. We all think that the plaintiff ought to have been allowed to amend at the trial, and in a case like this without costs.

Rule absolute.

¹ POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

 Holmes v. Penney.

 HOLMES v. PENNEY.¹

February 6, 1854.

Attorney — Dispaupering Order, Effect of — Promise, Nudum Pactum — Charges of Copying — Counsel's Fees.

The defendant, in June, 1853, retained the plaintiff, an attorney, to conduct an action for him, and in July obtained an order to sue in *forma pauperis*. On the 8th December an order for dispaupering him was obtained from the Master of the Rolls, who ordered it to relate back to the 31st of October, at which time the defendant became possessed of property on the death of his father. The defendant, whilst the pauper order was in force, had stated to the plaintiff that he would pay his costs on his father's death : —

Held, that as the dispaupering order only related to the litigating parties and not to their attorney, the plaintiff was not entitled to claim from the defendant payment of the costs incurred between the 31st of October and the 8th of December; that the defendant's promise to pay the same was *nudum pactum*, and that the plaintiff was not entitled to be paid his charges for copying, nor for counsel's fees which he had not paid.

THIS was an action by the plaintiff for work, &c., as an attorney.

Plea — Never indebted.

At the trial, before Channell, Sergt., at the last Surrey Summer Assizes, the facts were these : — The action was brought by the plaintiff, who was an attorney, to recover in respect of work done by him in that capacity for the defendant, who was plaintiff in a chancery suit of *Penney v. Christmas*. The defendant retained the plaintiff as his attorney in the chancery suit in June, 1853, and in July obtained an order to sue in *forma pauperis*. On the 8th of December an order for dispaupering the defendant was obtained from the Master of the Rolls, who ordered it to relate back to the 31st of October, at which time the defendant became possessed of property on the death of his father. The defendant, after the obtaining of the pauper order, and while it was in force, had stated to the plaintiff that he would pay the plaintiff's bill and costs on the death of his (the defendant's) father. The action was brought to recover the entire bill of costs from the date of the retainer to the termination of the chancery suit. The plaintiff's bill contained charges for copying and for counsel's fees, which latter, however, had not been paid. Several objections having been made to the plaintiff's right to recover the amount claimed, a verdict was taken for the whole amount, with leave to the defendant to move to reduce the damages by striking out the charges incurred during the time the defendant was suing as a pauper. Leave was also given to the plaintiff to amend by inserting a count for money paid, subject to the question of his right of recovering the counsel's fees. Another point reserved was, whether the defendant was to be liable, if at all, from the date of the dispaupering order, or from the time as from which he was declared to be dispaupered.

¹ 23 Law J. Rep. (N. S.) Exch. 132; 9 Exchequer Rep. 584.

A rule *nisi* having been obtained accordingly —

Hawkins and *Couch* for the plaintiff showed cause. The plaintiff, as the attorney of the defendant, was, at all events, entitled to be paid for all costs incurred between the 31st of October, the time from which the dispaupering order dated, and the 8th of December, the date of the order. The original contract between the plaintiff and the defendant was, that all the work done by the plaintiff should be paid for in the usual way. The dispaupering order is general in its terms, and operates to make the present defendant liable, not only to his opponent in the suit, but also to his attorney.

[PARKE, B. The plaintiff supposed he was not to be paid for his services during the time that his client was a pauper. Then, how is that relation between them altered by the order of the Master of the Rolls? No fraud has been found in this case. The contract in the first instance was, that the attorney was to be paid for his services. Then came the pauper order. After that he was bound to give his services gratuitously. He did so up to the 8th of December. Then came the order which was directed to relate back to the 31st of October, but that effect was to take place only as regarded the litigating parties. It lies on the plaintiff in this case to show the existence of a contract whereby he was to be paid for his services in the ordinary way. The Master of the Rolls was not called on to settle the dispute as between the plaintiff and his client; he was to settle it only as between the litigating parties. *Prima facie*, the attorney doing work for his client under the pauper order is not to be paid for it.]

The right of exemption from these costs is a privilege granted by the court. That privilege may be taken away, not only as between the parties, but also as regards the attorneys. The attorney, as the officer of the court, assigned by the court, from the 31st of October ceases to be such officer, and acted simply as attorney to the present defendant, and from that time there was an implied contract that he should be paid for his services. They referred to *Spencer v. Bryant*, 1 Ves. 49. Secondly, the plaintiff is entitled to be paid the law-stationer's charges incurred by him in copying the proceedings. They referred to *Daniel's Chancery Practice*, p. 111. The defendant promised to pay the costs upon the death of his father.

[PARKE, B. That was after the pauper order had been obtained.]

Thirdly, the plaintiff is entitled to recover for fees of counsel; for although he has not yet paid them, still he is liable to pay them.

[PARKE, B. It is quite clear that the plaintiff cannot charge for fees to counsel, as he has not paid them.]

Bovill, in support of the rule. The plaintiff is entitled to recover only up to the time of the petition for the pauper's order, viz., in July. The pauper's order merely carries into effect the statute of 11 Hen. 7, c. 12. The plaintiff covenanted to act as the defendant's attorney in this case, free of expense. As soon as the order was allowed, the plaintiff was appointed by the court, and is not entitled to charge any thing. This is a question of contract: prior to the date

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of the dispaupering order, the plaintiff did the work in pursuance of his engagement, and after that time there is no pretence for saying that he received a fresh retainer. This dispaupering order took effect only as between the parties. Even assuming the existence of fraud on the part of the defendant, that would not make him liable to the plaintiff, or create any contract between them. Secondly, as to the law-stationer's charges. The true rule is, that an attorney is not bound to pay law-stationer's charges; but if, in a pauper cause, he chooses to incur such charges without an express order to that effect, the expense falls within the pauper order, and he cannot charge his client for it. If this were not so, in lengthy pleadings, as in the celebrated case of *Small v. Attwood*, the pauper might be ruined, and the order would be no protection whatever.

[MARTIN, B. The attorney would not be entitled to charge for the draft of a brief, for he is bound to afford his client his skill and intelligence gratuitously.]

Lastly, the plaintiff is not entitled to charge the pauper with counsel's fees, especially where he has not paid them.

PARKE, B. Upon the first question, which is, whether counsel's fees not paid can be recovered in this action, I am of opinion that they cannot. They are gratuitous; as to that there can be no doubt, and the court are clear in their opinion upon that point. The next question is, whether the plaintiff's bill is to be reduced by the items incurred while the pauper's order was in force, that is, between the 31st of October and the 8th of December. The attorney is bound to render his advice and skill without fee or reward, according to the statute of 11 Hen. 7, c. 12, but that of course does not include money out of pocket. Now, as regards the charges between the 31st of October and the 8th of December, as to which interval the Master of the Rolls decided that the plaintiff was not a pauper, it is to be observed that the Master of the Rolls did not decide upon the pauper's liability to his own attorney: that was a point not before him. If the pauper, then, is to be charged for business done by his attorney during that interval, that could only be by virtue of a distinct employment and promise to pay, and if any such promise were made, the liability was not put on that ground at the trial. But if any such promise were made, there being no consideration, it was *nudum pactum*, and I am of opinion that such promise would not be binding. As to whether an attorney can charge for copying, I think, in the absence of any authority, that he cannot. He ought to make his draft so fair as not to require copying, and if he does not, that is his own fault. The principal part of the demand, therefore, on this action is not recoverable, and the damages must, accordingly, be reduced.

PLATT, B. I am of the same opinion. The plaintiff is entitled to the costs incurred before the pauper order and to those relating to the pauper order; but I do not think he is entitled to recover the costs which accrued between the 31st of October and the 8th of December.

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MARTIN, B. I am of the same opinion. It would be very unreasonable to hold that the plaintiff, who assisted in obtaining the pauper order for the defendant, could recover for services performed during the existence of that order.

Rule absolute.

GADSDEN v. BARROW.¹

February 7, 1854.

Interpleader — Title of third Party.

Upon an interpleader issue whether certain goods and chattels seized in execution were "at the time of the seizure the goods and chattels of the plaintiff," the plaintiff proved a bill of sale of the goods to himself: —

Held, that the defendant, the execution creditor, might set up, by way of answer, a prior bill of sale to a third party.

THIS was an interpleader issue in the old form, stating that a discourse was had between the plaintiff and the defendant as to "whether certain goods and chattels were at the time of the seizure thereof by the sheriff of Surrey the goods and chattels of the plaintiff; and thereupon the plaintiff then asserted," &c. The issue directed by the judge's order was, whether they were the "goods and chattels of the plaintiff as against the execution creditor." At the trial, before Martin, B., at the Middlesex Sittings after Michaelmas term, 1853, it appeared that the goods had been seized under a writ of *fi. fa.*, at the suit of the plaintiff against one Grice, on the 19th of October, 1853, and the plaintiff claimed them under a bill of sale to himself from Grice, dated the 19th of September, 1853. The defendant then proposed to prove that the same goods had been assigned to one Larking by a bill of sale dated the 5th of September in the same year; but his lordship thought the evidence was inadmissible, the question being only as between the plaintiff and the defendant. The verdict was found for the plaintiff, and a rule *nisi* subsequently obtained for a new trial, against which —

Petersdorff, now showed cause. The issue ought to have had the words "as against the execution creditor" according to the judge's order; and if it had been so framed, the question would have been limited to the rights of the plaintiff and the defendant.

[ALDERSON, B. These words only mean whether the alleged sale is *bonâ fide*.

PARKE, B. Suppose the plaintiff had brought trover against the sheriff, could he have succeeded?]

¹ 28 Law J. Rep. (N. S.) Exch. 184; 9 Exchequer Rep. 514.

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The sheriff is no party to the issue, and the execution creditor is precluded from setting up the claim of any third party. *Carne v. Brice*, 7 Mee. & W. 183. In that case the issue was whether certain wearing apparel was the property of one Morgan, at the time of the seizure, the plaintiff averring that it was. At the trial, it appeared the plaintiff had seized the wearing apparel under an execution against Morgan, when the defendants claimed it as trustees for Morgan's wife. Lord Abinger held, that they were not so entitled, and would not allow the defendants then to set up Morgan's bankruptcy so as to show that the plaintiff was not entitled to recover.

[PARKE, B. There the claimants were made the defendants, and it was rightly held, that unless they were entitled the plaintiff was. Here the plaintiff is the claimant, and unless they are his, he has no right to the verdict.]

A temporary possession in the plaintiff is sufficient. *Nicholls v. Bastard*, 2 Cr. M. & R. 659.

E. James, contra, was not called upon to support the rule.

PARKE, B. The execution creditor sets up that which is an answer to the plaintiff's claim.

ALDERSON, B. In *Carne v. Brice*, the issue was the wrong way, the execution creditor being made plaintiff instead of defendant. The claimant is now the plaintiff, and he has to establish his claim against the defendant. Here it is clear he had no title if the first bill of sale was *bonâ fide*. Let there be a new trial, and its validity can then be tried.

PLATT, B., concurred.

MARTIN, B. I do not mean to differ from the judgment of the rest of the court; but I think that in a question of this kind you ought not to allow other people to interfere; and the simple matter to be inquired into is, whether the bill of sale put forward by the plaintiff is valid; and if so, he ought to succeed. However, the rest of the court are of a different opinion.

Rule absolute.

Hunt v. Remnant.

IN THE EXCHEQUER CHAMBER.

HUNT v. REMNANT.¹

February 9, 1854.

Covenant — Right of Entry for Condition broken — Whether conveyed by Assignment of Reversion.

E, the tenant of leasehold premises, underlet a portion of them to B for a term of years, reserving a few months' reversion. B covenanted to complete some cottages on the premises by the 25th of June. By an indenture, made on the 30th of July following, which recited that E had entered into several agreements and under-leases affecting the leasehold premises, the particulars of which were known to J, it was witnessed that E did "bargain, sell, assign, transfer and set over the said leasehold premises, with their appurtenances, and all the estate, right, title and interest of him the said E in, to, or out of the said premises and every part thereof, to J, to have and to hold the said premises and every part thereof for the residue of the term of years granted by the indenture of lease under which E held, and all other the estate and interest of the said E therein or thereout, subject nevertheless to the agreement and under-leases hereinbefore referred to." B did not build the cottages by the 25th of June. It did not appear whether E knew of the fact, or elected to treat the default as a breach of covenant and a forfeiture of the lease: —

Held, that assuming that the non-completion of the cottages was a breach of covenant, and gave E a right of re-entry before the assignment to J, and that the statute 8 & 9 Vict. c. 106, s. 5, enabled E to assign the right of entry for condition broken, yet that the language of the indenture was not sufficient to transfer that right to J, so as to enable him to take advantage of the forfeiture.

THIS was a writ of error by E. Hunt, the defendant below, on a bill of exceptions to the ruling of Pollock, C. B., on the trial of an action for ejectment. E. Hunt had let certain premises, for a term of years, to one Bishop, who had covenanted to build on the premises some cottages by the 25th of June, 1853, but had not built them. On the 30th of July following, E. Hunt assigned his reversionary estate in the premises to J. Hunt. Bishop had mortgaged the premises to Remnant the plaintiff, and had underlet them to him to secure the mortgage. After this J. Hunt brought an ejectment against Bishop, on the ground that the lease had been forfeited by his failure to build the cottages, and that the right to enter for the condition broken had passed, by the assignment of the reversion, to him, J. Hunt. The court decided that J. Hunt was not entitled to recover. Subsequent to the trial of the action of *Hunt v. Bishop*, 8 Exch. Rep. 675; s. c. 20 Eng. Rep. 542. Remnant had entered as mortgagee, but had allowed Bishop to hold the premises for him. Bishop, however, in fraud of Remnant's right, was induced by E. Hunt to give up possession to him as agent for J. Hunt. Remnant thereupon brought the present action against E. Hunt, who relied upon the same points in behalf of J. Hunt's right to the premises as

¹ 23 Law J. Rep. (N. S.) Exch. 135; 18 Jur. 335; 9 Exchequer Rep. 635. Before COLERIDGE, J., MAULE, J., WIGHTMAN, J., CRESSWELL, J., ERLE, J., WILLIAMS, J., TALFOURD, J., and CROMPTON, J.

Hunt v. Remnant.

were urged in *Hunt v. Bishop*, the report of which case fully sets out the material facts and documents on which the point depended. Pollock, C. B., ruled, in conformity with the decision of the court, that Remnant was entitled to the possession of the premises.

Bramwell, for the plaintiff in error, the defendant below. The direction of the Chief Baron, in conformity with the decision of the court in *Hunt v. Bishop*, was, it is submitted, wrong. The plaintiff was not entitled to recover. The meaning of the covenant that the lessee is to build to the satisfaction of the surveyor of the lessor, means that he shall build at all events, and to the satisfaction of the lessor's surveyor, if he appoint one. The facts of the case show that the lessee did not build, and consequently there was a breach of covenant, and if so a forfeiture of the lease. For though the words "to re-enter" be omitted by accident in the lease, yet it remains clear that the lessor is to repossess the property on the breach of a covenant. E. Hunt, therefore, had a right of entry. This right he never waived. When he conveyed his reversion to J. Hunt, the right of entry passed with it. By the statute 7 & 8 Vict. c. 76, s. 5, power is expressly given to assign a right of entry for condition broken, and though that statute be repealed by the statute 8 & 9 Vict. c. 106, s. 5, yet the latter statute, by section 6, enacts that "a right of entry, whether immediate or future, and whether vested or contingent," may be assigned.

[MAULE, J. The statute seems to contemplate a right of entry at the end of an estate or interest, not a right of entry for condition broken, which is clearly a litigious right. It did not mean to assign a right of action.]

The words of the statute are perfectly general. By the statute of Wills, 1 Vict. c. 26, s. 3, a right of entry for condition broken is expressly made devisable. Though the assignment refers to leases affecting the premises, it does not recognize this particular lease as existing. It does not show that E. Hunt waived the forfeiture if he was aware of it. If he was not aware of it, he clearly did not waive it. It must be assumed, on the contrary, that E. Hunt had elected to take advantage of it. There are, it is true, no express words conveying the right of entry, but it is submitted that the right passed with the reversion by virtue of the statute.

Honyman, for the defendant in error, the plaintiff below, was not called upon.

COLERIDGE, J. We are all of opinion that the direction of the Chief Baron was right, and that upon a very strict point. The plaintiff is entitled to recover if the lease be still subsisting. If it be not subsisting, it is because there has been a cause of forfeiture of which advantage can be taken. We will assume that there was a cause of forfeiture, as is contended, in the time of E. Hunt. There is no evidence to show that he had availed himself of it. The conveyance by him to J. Hunt was on the 30th of July, and after the cause of forfeiture. The indenture began by stating the lease to E. Hunt, and

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recited that subsequent to the lease he had made several agreements or underleases affecting the premises. It then says that E. Hunt did "bargain, sell, assign, and transfer and set over the said leasehold premises with their appurtenances, and all the estate, right, title and interest of him, the said E. Hunt, in, to, and out of the said premises and every part thereof for the residue of the terms of years by the aforesaid indenture of lease, and all other the estate and interest of the said E. Hunt therein and thereout, subject nevertheless to the agreements and underleases hereinbefore referred to." If by operation of the statute 5 & 9 Vict. c. 106, the right of entry was not capable of being passed, then there is an end of the question. But supposing it was capable of passing, we must see whether by the instrument under which J. Hunt takes the interest the right of entry passed or was intended to pass. There are, it is true, general words conveying all the estate and interest of E. Hunt, but there are no particular words conveying this right. We are all of opinion that there was no intention or sufficient words to pass the right of entry if it could be assigned. Two assumptions have been made: first, that E. Hunt knew of the forfeiture; and, secondly, that he did not. If he knew of it, he uses no words either importing that knowledge, or showing an intention to convey the right. On the contrary, he recognizes the leases made before. If he did not know of it, there is still less ground for supposing that he intended to convey the right. On either ground, we think that the direction is right.

The other judges concurred.

Judgment affirmed.

ARNOLD v. HAMEL.¹

January 14, 1854.

Revenue — Customs Acts — Notice of Action — Evidence.

The 8 & 9 Vict. c. 87, s. 117 (Customs Consolidation Act) enacts, that no writ shall be sued out against any officer of the customs or against any person acting under the direction of the Commissioners of her Majesty's Customs for any thing done in the execution of or by reason of his office until a month's notice of action shall have been given, stating the cause of action, &c. The 118th section enacts, that no plaintiff, in any case where an action shall be grounded on any such act done by the defendant, shall be permitted to produce any evidence of the cause of such action, except such as shall be contained in the notice to be given as aforesaid or shall receive any verdict against such officer or person unless he shall prove on the trial of such action that such notice was given; and in default of such proof the defendant in such action shall receive a verdict with costs, as hereinafter mentioned: —

Held, that, upon the trial of an action against an officer of the customs, it is the duty of the judge, unless the facts are admitted, to hear the evidence and decide whether the defendant did the act complained of, honestly believing that his duty called upon him to do it, in which case the provisions as to notice of action would be applicable.

¹ 23 Law J. Rep. (N. S.) Exch. 137.

 Arnold v. Hamel.

TRESPASS and false imprisonment.

At the trial, before Pollock, C. B., at the Sittings for Middlesex after Trinity term, 1853, the case was opened by the counsel for the plaintiff, who stated that the action was brought for an illegal arrest and imprisonment of the plaintiff by the defendant, who had caused the plaintiff to be kept on board a revenue cutter for several months. He also stated that the defendant was believed to be the solicitor to the customs, and that some pretence would be set up that the act complained of was required to insure the attendance of the plaintiff as a witness in prosecutions against certain dock companies. No admission was made in the opening statement that the act complained of was done in the execution of the defendant's duty or by reason of his office. No notice of action had been given. His lordship upon this statement nonsuited the plaintiff.

A rule to set aside this nonsuit had been obtained, against which

The Attorney General (Sir A. E. Cockburn,) Sir F. Theigier and J. Wilde now showed cause.¹ There will be three questions. First, whether the defendant, being the solicitor to the customs, is an officer of the customs? Secondly, whether it was sufficient to show that he was acting as an officer of the customs, or was it requisite to show that he was acting *bonâ fide*? and thirdly, whether the course adopted by the learned judge at the trial was correct? The solicitor to the customs is an officer of the customs. 9 Geo. 4, c. 25, 8 & 9 Vict. c. 85, ss. 6, 7, 10, 11. Then under the 8 & 9 Vict. c. 87,² he is entitled to notice of action where the cause of action is "any thing done in the execution of or by reason of his office," and the defendant would not have acted as he did unless he had been solicitor to the customs. They cited *Bartlett v. Smith*, 11 Mee. & W. 483; *Cook v. Leonard*, 6 B. & C. 351; *Gaby v. The Wilts Canal Company*, 3 M. & S. 580; *Booth v. Clive*, 10 Com. B. Rep. 857; s. c. 4 Eng. Rep. 374. The course adopted by the Lord Chief Baron was strictly according to the act, for the defendant is not to be permitted to give any evidence unless there has been notice given. Lord Tenderden

¹ POLLOCK, C. B., PARKE, B., ALDERSON, B., and MARTIN, B.

² Section 177 enacts, "That no writ shall be sued out against, nor a copy of any process served upon, any officer of the army, navy, marines, customs, or excise, or against any person acting under the direction of the commissioners of her Majesty's customs, for any thing done in the execution of, or by reason of his office, until one calendar month next after notice in writing shall have been delivered to him, or left at his usual place of abode, by the attorney or agent for the party who intends to sue out such writ or process as aforesaid, in which notice shall be clearly and explicitly contained the cause of action, the name and place of abode of the person who is to bring such action, and the name and place of abode of the attorney or agent; and that a fee of 20s. shall be paid for the preparing and serving of each such notice, and no more."

Section 118 enacts, "That no plaintiff in any case when an action shall be grounded on any such act done by the defendant shall be permitted to produce any evidence of the cause of such action, except such as shall be contained in the notice to be given as aforesaid, or shall receive any verdict against such officer or person, unless he shall prove on the trial of such action that such notice was given; and in default of such proof the defendant in such action shall receive a verdict, with costs, as hereinafter mentioned."

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took the same view of the old statute 7 & 8 Geo. 4, c. 53, s. 118, which contained a similar provision. *Johnson v. Lord*, Moo. & M. 444.

[PARKE, B. No doubt, it is a question for the judge and not for the jury, but how can the judge know whether the action is brought against the defendant as an officer unless he hears the evidence? You must modify the words of the section to make it intelligible. The question as to the defendant being an officer is collateral to the issue, and must be tried by the judge like any other collateral question. He is to decide it, and a bill of exceptions would not lie to his decision.]

Grove and *Hawkins* were not heard.

PARKE, B. I think we are all agreed that this rule must be absolute. The 118th section refers to evidence to be laid before the jury. The question is for the judge to decide whether the defendant is entitled to notice, and to do this he must hear either a statement of the plaintiff's counsel meaning to pledge himself to it as a statement of the facts, or so much evidence on either side as may be necessary. In this case there was no such statement made, and there was therefore no sufficient ground for a decision. On the new trial, the question will be for the judge to determine whether the defendant acted honestly, believing that his duty called upon him to do what he did. Of course, the reasonableness of the belief would be an element in deciding as to the *bona fides*. *Booth v. Clive*. In determining this also, the question as to the solicitor being an officer of the customs will arise.

ALDERSON, B. I am of the same opinion. The real question is, whether the officer was acting in honest ignorance and conscientious belief that he was acting in the discharge of his duties.

MARTIN, B., and POLLOCK, C. B., concurred.

Rule absolute.

CROWN CASES

RESERVED FOR THE CONSIDERATION AND DECISION

OF THE

COURT OF CRIMINAL APPEAL;

DURING THE YEAR 1854.

REGINA v. SAMUEL GILL.¹

January 28, 1854.

Embezzlement — Larceny.

The prosecutor gave some marked money to J. W. to expend at his (the prosecutor's) shop, for the purpose of detecting a servant, of whom the master had suspicions. The servant was convicted of embezzling a portion of the marked money :—

Held, upon the authority of *Rex v. Headge*, 2 Leach's C. C. 1033, that the conviction was right.

THE prisoner was indicted at the November Middlesex Sessions, 1853, for stealing one crown piece, the property of his master. It was proved at the trial, that the master, who was a licensed victualler, suspecting the prisoner, marked the crown piece in question, and two half-crowns, and gave them to one J. W. for the purpose of purchasing spirits of the prisoner, who was the prosecutor's bar-man. J. W. accordingly, early the next morning, purchased at the bar some brandy, and paid the prisoner with the marked money, and it was his duty to have placed the same in the till. When his master came down he looked into the till, and found there the two half-crowns only. Upon the prisoner being charged with the offence, he admitted the receipt of the crown piece, but said that he had given it away as part of the change for half a sovereign. The crown piece was found in a bag in his box, separate from his other silver, which was wrapped in paper. The jury acquitted the prisoner of larceny, but found him guilty of embezzlement. Judgment was respited, and the prisoner

¹ 18 Jur. 70. Before JERVIS, C. J., MAULE, J., WIGHTMAN, J., PLATT, B., and WILLIAMS, J.

Regina v. Burton.

committed to abide the decision of this court; the question reserved for the consideration of the court being, whether, upon the facts as proved, the offence was larceny or embezzlement.

No counsel appeared for the prisoner.

Clarkson, in support of the conviction.

[JERVIS, C. J. In *Rex v. Hedge*, 2 Leach's C. C. 1033; Russ. & R. C. C. 160, where the master had given marked money to a friend for the purpose of purchasing goods at the master's shop, and the shopman took the money, it was held to be embezzlement; but in *Rex v. Peck*, 2 Russ. 213, the money was given to the servant by the master himself, and there it was larceny. Where is the distinction?]

The distinction is, that in the one case the money passed out of the master's hands; the property as well as the possession was parted from; and in the other case it was not. To support embezzlement, it is enough to show that the money found its way to the servant by the hands of a third person. In *Hedge's case* the indictment was founded upon stat. 39 Geo. 3, c. 35; but the words of the present Embezzlement Act, 7 & 8 Geo. 4, c. 29, are even larger; and that case is therefore still an authority, and is in point.

[JERVIS, C. J. In *Rex v. Murray*, 1 Moo. C. C. 276, the master gave the money to a servant to give to another servant, and it was held to be larceny.

MAULE, J. Suppose, instead of giving money, the master gives a piece of cloth to a friend to give to a servant, with directions to take it to the master, and the servant appropriates it *animo furandi*; according to *Hedge's case* that is not larceny, and yet the possession of the master's friend is the possession of the master.]

JERVIS, C. J. *Rex v. Hedge* is expressly in point, and shows that this is embezzlement, and we must be bound by that case.

Conviction affirmed.

REGINA v. JOHN BURTON.¹

January 28, 1854.

Larceny — Proof of Corpus Delicti.

The prisoner was found coming out of a warehouse, where a large quantity of pepper was kept, with pepper of a similar quality in his possession. He had no right to be in the warehouse, and on being discovered said, "I hope you will not be hard with me," and took some pepper out of his pocket and threw it upon the ground. There was no evidence of any pepper having been missed from the bulk: —

Held, that there was sufficient evidence to go to the jury of the *corpus delicti*.

Regina v. Dredge, 1 Cox's C. C. 235, considered.

¹ 18 Jur. 157. Before JERVIS, C. J., MAULE, J., WIGHTMAN, J., PLATT, B., and WILLIAMS, J.

Regina v. Burton.

THE prisoner was indicted at the January Middlesex Sessions, 1854, for stealing a quantity of pepper. It was proved on the trial, by the person having charge of the warehouse, that the prisoner was seen coming from the lower room of a warehouse in the London Docks, in the floor above which a large quantity of pepper was deposited, some in bags and some loose upon the floor, and that the witness, having suspicion of the prisoner from the bulky state of his pockets, stopped him, and said, "I think there is something wrong about you;" upon which the prisoner turned and said, "I hope you will not be hard with me," and threw a quantity of pepper out of his pocket on the ground. The witness further proved that no pepper was missed, and that he could not say, from the large quantity of pepper that was in the warehouse, that any had been stolen, but the pepper found on the prisoner was of the like description with the pepper in the warehouse. The prisoner had no business in the warehouse. It was contended by the prisoner's counsel, on the authority of *Regina v. Dredge*, 1 Cox's C. C. 235, that upon this state of facts the judge was bound to direct an acquittal. The court overruled the objection, being of opinion, that, notwithstanding the statement of the witness that he could not swear that any pepper was stolen, there was evidence to go to the jury. The jury returned a verdict of guilty, and the question reserved for the consideration of the court was, whether the court ought to have directed a verdict of acquittal, or to have left the case for the consideration of the jury.

Ribton, for the prisoner. *Regina v. Dredge*, is precisely in point. The facts of that case were, that the prisoner, a little boy, dressed in a smock-frock, came into the prosecutor's toy-shop; after remaining there some time, suspicion was excited; he was searched, and under his smock-frock were found some toys. The prosecutor swore that he believed the toys to be his property, but from the nature of his stock was unable to say that he had missed any of the articles which the prisoner was charged with stealing; upon which Erle, J., directed an acquittal, upon the ground that the prosecutor had failed to make out a case.

[JERVIS, C. J. It could not have been intended to lay down a principle in that case.]

MAULE, J. There the prisoner was in a shop, where he might lawfully be; here he was where he ought not to be. The boy in that case kept to the property; the man in this abandoned it, and threw it down. In this case the man admitted he had done something wrong.

PLATT, B. It is a question for the jury.]

Before a prisoner can be called upon to answer a charge of larceny, there must be proof of a loss. If there were no authorities for this, reason alone would point out the justice of the rule, *nemo tenetur prodere seipsum*. Just. Cod. lib. 2, tit. 1, 4; Dig. lib. 22, tit. 3; Hob. 103.

[WIGHTMAN, J. Is it necessary in all cases to show that some par-

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particular person has lost goods? A person may be indicted for stealing the property of a person unknown.]

But the taking must be distinctly proved; the party charged may have been seen in the very act *flagrante delicto*. There are two ways of proving the *corpus delicti* — by showing a loss, or by proving distinctly and conclusively that the party charged was seen in the act of taking.

[MAULE, J. Where do you find that the *corpus delicti* must be distinctly and conclusively proved.]

In 2 Stark. Ev. 709, it is said, "It has been laid down by Lord Hale as a rule of prudence, in cases of murder, that, to warrant a conviction, proof should be given of the death by evidence of the fact, or the actual finding of the body," (citing 2 Hale, 290.) The same rule applies in all criminal cases.

[MAULE, J. Lord Hale thought it was a rule which should apply, *ex majori cautela*, to cases of murder. In a recent case, (*Daniel Good's*), only a small part of the body, and that much burnt, so that it could not be identified, was found, and yet he was convicted of the murder and executed.]

[He referred to *Dickson v. Evans*, 6 T. R. 57.] In *Evans v. Evans*, 1 Hagg. Const. Rep. 35, Lord Stowell said, (p. 105,) "If you have a criminal fact ascertained, you may then take presumptive proof to show who did it — to fix the criminal, having then an actual *corpus delicti*." The *corpus delicti* may perhaps be proved by a confession, but this has been doubted. 1 Tayl. Ev. 583. At all events, there was not in this case so full and complete a confession as would constitute such proof.

Clarkson, in support of the conviction, was not called upon.

JERVIS, C. J. The conviction is perfectly right. The distinction between this and the case relied upon has been pointed out by my brother Maule.

Conviction affirmed.

REGINA v. JOHN SHARMAN.¹

January 28, 1854.

Forgery at Common Law — Uttering.

The prisoner was indicted for forging a testimonial to his character as a schoolmaster, and other counts of the indictment charged him with having uttered the forged document. The jury acquitted him of the forgery, but found him guilty of the uttering with intent to obtain the emoluments of the place of schoolmaster, and to deceive the prosecutor: —

Held, that this finding of the jury amounted to an offence at common law, of which the prisoner was properly convicted.

¹ 18 Jur. 157. Before JERVIS, C. J., MAULE, J., WIGHTMAN, J., PLATT, B., and WILLIAMS, J.

Regina v. Sharman.

THE prisoner was tried at the January Sessions of the Central Criminal Court, 1854, before Williams, J., and Platt, B., on an indictment, which, after stating that at the time of committing the offences thereafter mentioned, the rector of the parish of Tinningley, in the county of York, was desirous of engaging a fit person to fill the place of schoolmaster of the parochial school of that parish, and that the said John Sharman had made application for the said place, and the rector had required from Sharman, for the purpose of satisfying him, the rector, testimonials as to the qualification and character of Sharman, and as to his fitness for the said place of schoolmaster, charged that Sharman, intending, by false, fraudulent, and deceitful representations, to procure himself to be appointed to the said place of schoolmaster, falsely, knowingly, and deceitfully did make, forge, and counterfeit a certain writing to the likeness and similitude of, and as and for a genuine writing of and under the hand of W. H. Johnson, the rector of the parish of Lutterworth, in the county of Leicester, with intent, in so doing, to injure, prejudice, and deceive, which writing was as follows :—

“ Gentlemen,— Mr. and Mrs. Sharman have been known to me for some years, and for some time they had the charge of a large school under my control and superintendence, which they conducted with great ability and success ; indeed, committee, parents, and children were sorry when they resigned, and some of the latter presented them with small tokens of their esteem. I have, therefore, very great pleasure in bearing my testimony to their excellent moral character, and their suitability for the office of instructor to the rising generation, and can with confidence recommend them for the situation they seek, knowing them to be peculiarly adapted to the right management of children.

“ November 12, 1853

“ W. H. JOHNSON.”

The second and third counts charged the forgery more generally. The fourth, fifth, and sixth counts, (which otherwise corresponded with the first, second, and third,) charged Sharman with having uttered the forged writing knowing it to be forged. The prosecutor proved the following facts :— On the 17th December last, the situation of schoolmaster of the parish school of Tinningley, in Yorkshire, was vacant, and Sharman had applied for it, and had sent in to the rector of that parish papers purporting to be copies of certificates of character, and amongst them one purporting to be a copy of a testimonial from the Rev. William Henry Johnson, the rector of Lutterworth. On the day which had been appointed for the production of the original testimonials, Sharman attended for that purpose in Parliament street, Westminster, at the office of Mr. Baxter, a parliamentary agent, who had been authorized by the rector of Tinningley to inspect and examine them. On that occasion, being required by Mr. Baxter to produce the original of the writing purporting to be a copy of a testimonial from the rector of Lutterworth, he produced the writing set forth in the indictment, and, in answer to Mr. Baxter's

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questions, falsely stated that it was the testimonial of the rector of Lutterworth, and bore the rector's signature; in fact, the document had not been written or signed by the rector, but was altogether a forgery. The jury acquitted him of the forgery, but found him guilty of uttering the forged document, knowing it to be forged, with intent to obtain the emoluments of the place of schoolmaster, and to deceive. Judgment was postponed in order to obtain the opinion of the Court of Appeal, whether the act of which the jury found Sharman guilty was an offence at common law.

Counsel were not instructed on the part of the prisoner.

Clarkson, in support of the conviction. There is some doubt whether an instrument of this nature can be the subject of an indictment at common law. It is laid down in 2 Russ. 358, citing Bac. Ab., "Forgery," B., and 2 East's P. C. 861, that "the counterfeiting of any writing with a fraudulent intent, whereby another may be prejudiced, is forgery at common law." The first question therefore is, whether the finding of the jury brings the case within the meaning of this definition. They have not found that the prisoner intended to defraud, but that the uttering of the instrument was for the purpose of deceit, and of acquiring the office of schoolmaster.

[MAULE, J. Is there not an intention to defraud if it is intended that a party should act upon a representation whereby something would be obtained from him?]

The next question is, whether the uttering this document, the forgery of which is only a forgery at common law, is a criminal offence, unless some fraud were actually perpetrated by it. *Regina v. Toshack*, 1 Den. C. C. 492.

[WILLIAMS, J. *Regina v. Boulton*, 2 Car. & K. 604, has created some doubt in my mind.]

It was formerly the practice to charge both the forgery and uttering in one count. *Rex v. Ferrers*, Trem. Entr. 129, reported Sid. 278, and referred to in *Regina v. Boulton*.

JERVIS, C. J. The court are of opinion that this is an offence at common law. *Conviction affirmed.*

REGINA v. ABRAHAM GREEN.¹

February 11, 1854.

Larceny — Master and Servant — Account between.

It was the prisoner's duty, as bailiff to the prosecutor, to pay and receive moneys. Upon an account rendered of such payments and receipts, it appeared he had charged his master

¹ 18 Jur. 158. Before JERVIS, C. J., MAULE, J., WIGHTMAN, J., PLATT, B., and WILLIAMS, J.

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with five payments of 1*l.* 8*s.*, instead of 1*l.* 4*s.*, the sums he had actually paid. There was also a similar overcharge of two other amounts:--

Held, that the prisoner was wrongly convicted of larceny, the offence, if any, being that of obtaining money by false pretences.

At the Epiphany Sessions, for the county of Cambridge, the prisoner was indicted for stealing certain moneys of his master. He was bailiff to the prosecutor, and it was part of his duty to receive and make payments on behalf of his master. An account of these receipts and payments was kept in a book in the prisoner's custody, which was examined by the prosecutor at irregular intervals. Upon one of these examinations, it appeared that the prisoner had entered in the book and charged his master with five weekly payments of 1*l.* 8*s.* each, as wages paid to a workman, whereas, in truth, he had paid only 1*l.* per week, with an additional 1*l.*, making the five payments 1*l.* 4*s.* each, instead of 1*l.* 8*s.* There were two similar entries of 15*s.* each, when only two sums of 11*s.* 6*d.* had been paid. There was a balance of 2*l.* due to the prisoner upon the whole account, which the prosecutor paid him. It was left to the jury to say whether this was larceny or embezzlement, and they found him guilty of the former. The opinion of the court was now asked as to whether, under the above circumstances, the prisoner was properly convicted of larceny.

Tozer, appeared for the prisoner.

JERVIS, C. J. This is certainly not larceny, although it may be obtaining money by false pretences.

Conviction quashed.

REGINA v. HEWGILL.¹

February 11, 1854.

False Pretences — Variance — Evidence.

Upon a charge of obtaining money by false pretences, it is sufficient if the actual substantial pretence, which is the main inducement to part from the money, be alleged in the indictment, and proved; although it may be shown by evidence that other matters not laid in the indictment in some measure operated upon the mind of the prosecutor as an inducement for him to part from his money.

At the last Epiphany Quarter Sessions for the county of Southampton, holden at Winchester, the defendant was indicted for obtaining 15*l.* under false pretences. The indictment alleged that he unlawfully and knowingly did falsely pretend to one Thomas Waters

¹ 18 Jur. 158. Before JERVIS, C. J., MAULE, J., WIGHTMAN, J., PLATT, B., and WILLIAMS, J.

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that he had received "an order for the payment of money, to wit, the sum of 25*l.*, from one W. M. Cosser," and "for the payment of a quarter's salary then due and owing to the said Henry Frederick Hewgill;" whereas, in truth and in fact, the said sum of 25*l.* was not then and there due and payable to him, the said Henry Frederick Hewgill, nor had the said W. M. Cosser given to him, the said Henry Frederick Hewgill, any order for the payment of the said sum of 25*l.* in respect of the said quarter's salary, nor for any sum whatever. The prosecutor proved that the defendant, who was a curate, Mr. Cosser being the vicar, came to his shop, and told him that he had received an order that morning to go and receive his quarter's salary of one Leighton; that Leighton was ill, and therefore he asked the prosecutor to oblige him with the money, and he did ultimately advance 15*l.* Before the money was given him the defendant showed to the prosecutor a receipt in these words:—"Received of Mr. Leighton the sum of 25*l.* for the Rev. W. M. Cosser's order." He afterwards gave the prosecutor a receipt for the 15*l.* in similar terms.

In cross-examination the prosecutor said—"I had no doubt the paper he produced (the receipt) was genuine. I acted on that as much as on the other part of the transaction. It contributed to produce confidence; and it was in consequence of what I saw, and what he said, and what he gave me, that I was induced to let him have the money; without a receipt I should not have done it. The defendant first told me that he had received a letter from Mr. Cosser, wishing him to go to Mr. Leighton to receive his quarter's salary that morning; that was part of my inducement to let him have the money." He further said, in re-examination, "Had I known he had no order from Mr. Cosser, I should not have let him have the money." Mr. Cosser negatived his having sent him any order; that one quarter's salary was due, and that he had written to the defendant on the subject. It was then objected that there was a material variance between the pretence laid and the pretence proved; that the only false pretence alleged was, that the defendant received an order for the payment of money from Mr. Cosser, purporting to be for the payment of a quarter's salary then due and owing to him in respect of his curacy, whereas there was no proof which would support the description of the order in the indictment; but, in fact, the only pretence proved was of the receipt of a letter, wishing him to go to Mr. Leighton to receive his quarter's salary; and that, beyond the pretence laid, there were other things proved to have been essential parts of the prosecutor's inducement to part with his money, viz., the receipt drawn for Mr. Leighton, and the receipt for 15*l.* given to the prosecutor, and material parts of the pretences proved, which were not stated at all in the indictment, as they ought to have been. *Rex v. Pleslow*, 1 Camp. 494; *Rex v. Cartwright*, Russ. & R. C. C. 106; *Rex v. Perrott*, 2 M. & S. 390, per Bayley, J.; *Reg. v. Wickham*, 10 Ad. & El. 34. The court, however, being of opinion that the statement of the receipt of the letter was not a variance from the pretence that the defendant had received an order for the payment of money, nor a separate pretence, but either identical with it, or a mere

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explanation how he was to get the pretended order cashed — that the receipt of Mr. Leighton operated merely to produce confidence in the pretended order, and the receipt to the prosecutor was only required as a security to satisfy Mr. Cosser that the money had been paid on his order—overruled the objection, and left it to the jury to say, first whether the defendant made use of the pretence alleged in the indictment, viz., that he had received an order for the payment of 25*l.* from Mr. Cosser for a quarter's salary then owing to him in respect of his curacy; secondly, whether the prosecutor parted with his money in consequence of his belief in that pretence; thirdly, whether it was false; and, fourthly, whether the defendant obtained the money with intent to defraud. The defendant was convicted; and the questions reserved for the opinion of the court were, whether the ruling of the Court of Quarter Sessions on the objections taken, and their directions to the jury, were right.

Saunders, (*Poulden* with him) appeared for the prisoner, and in support of the objections taken in the court below, relied upon the cases there cited.

JERVIS, C. J. We are asked whether the ruling and direction to the jury of the Court of Quarter Sessions were right; and our answer is that they were right. Because it came out on cross-examination that the defendant said he had received a letter, therefore it seems to be contended that he did not say he had received an order. A further objection was, that it was not proved that he pretended he had received an order for money then due and payable; but what can be the meaning of saying he had received an order for a quarter's salary, but that it was due and payable? Another objection is, that part of the inducement to the prosecutor to part with his money was the receipt; but the actual substantial pretence was, that he had received the order; the receipt was not the main inducement upon which the money was parted from. The pretence was found by the jury, and correctly found. The ruling and direction were right, the verdict was right and the objections were wrong. *Conviction affirmed.*

REGINA v. EDWARD BEAUMONT.¹

February 4, 1854.

Embezzlement — Money received on Account of Master.

W. had contrasted with the Great Northern Railway Company to provide horses and carmen for the delivery of their coals. By the terms of the agreement W. was to provide a sufficient number of steady and honest carmen for the delivery of the coals, and "for collecting and duly accounting for the moneys received for the same;" such carmen were "to obey, perform, and execute" the orders of the company's manager in all things connected

¹ 18 Jur. 159. This case was argued on the 21st January, and then ordered to be re-argued before the fifteen judges: Lord CAMPBELL, C. J., PARKE, B., ALDERSON, B., COLERIDGE, J., MAULE, J., WIGHTMAN, J., and CRESSWELL, J., PLATT, B., WILLIAMS, J., MARTIN, B., and CROMPTON, J.

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with the delivery of the coals, "and receipt and payment of moneys" received by them; and further; it was agreed that W. or the carmen should daily "well and truly pay, account for, and deliver to the said company's coal manager all checks, moneys," &c., which they might receive in payment of the coals. The course of business was for the carmen to receive delivery notes and receipted invoices from the company's office. The former they took to W.'s office for the purpose of being entered in his books, but the invoices were left with the customer on payment of the account. The prisoner was a carman of W., and the case found that it was his duty to pay over direct to the company's clerks any money he received for coals. He, however, having delivered coals to a customer, received the money, and appropriated it to his own use, and was then indicted for embezzling the money of W., his master:—

Held, by a majority of the judges, that there was a privity between the prisoner and the company so as to make him their agent; that he agreed to pay the money to them, and therefore he had not received it on account of W., and was wrongly convicted of embezzling W.'s money.

THE prisoner was tried and convicted at the Central Criminal Court upon an indictment for embezzlement, whereby it was charged, in the usual manner, that he, being servant to Edward Wiggins, by virtue of his employment as such servant received the sum of 5*l.* 10*s.* on account of his said master, and feloniously embezzled and stole that sum of money, and alleging that money to be the money of the prosecutor. Edward Wiggins, the prosecutor, had become a contractor with the Great Northern Railway Company for finding and providing them with necessary horses and carmen, for the purpose of drawing, conveying, and delivering to their customers the coals of the company in their own wagons, and had moreover contracted with the company that he or his carmen should day by day duly account for and deliver to the company's coal manager, all moneys received from such customers in payment for coals so delivered. The delivery notes as well as receipted invoices of the coals were handed to the carmen of Wiggins, and the former were taken to his office to be entered in his books, but the invoices which were already receipted by the company, were to be left with the customer on payment of the account.

The prisoner was the servant of Wiggins, and was employed by him as his carman, in the delivery of coals pursuant to the above contract, and it was his duty to pay over direct to the clerks of the company, any money he might receive for any such coals. It did not appear that such moneys so received by him and paid over to the company, ever formed items of account between Wiggins and the company. On the day mentioned in the indictment, the prisoner had, as the servant of Wiggins, delivered coals of the company to one of their customers, having first brought the delivery order to Wiggins's office and had it entered in his books. He received in payment, as the price of the coals, the sum of 5*l.* 10*s.* mentioned in the indictment, and left the receipted invoice with the customer; this sum he never handed over or accounted for to the company or their clerks, but converted the same to his own use, thereby rendering his master liable to pay that amount to the company under the contract. This was the embezzlement upon which the prosecutor relied. It was contended for the prisoner, first, that the money had not been received on account of the prosecutor, and that, under such circumstances, the crime of embezzlement, within the meaning of the

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indictment and the 7 & 8 Geo. 4, c. 29, had not been completed; secondly, that the ownership of the money stated in the indictment was not proved as laid. Upon the first point the jury were directed, that as the prisoner was the servant of Wiggins, and received the money in the course of his employment as such servant, they might, under the above circumstances, find that he received it on account of his master, in the sense used in and required to be proved by the indictment. On the second point, that even if it were necessary to prove the money obtained to be the property of the prosecutor. (of which there was some doubt,) yet if they found that it was received by the prisoner on the prosecutor's account, it would be the property of the master in the sense of the allegation in the indictment. Having doubts as to the propriety of this ruling on both the above points, the learned recorder reserved them for the consideration of this court, and judgment was respited. Counsel were to be at liberty to refer to the terms of the contract itself, which, for that purpose was to be considered part of the case. The clauses of the agreement relied upon in argument were — "And (Edward Wiggins) also shall and will find and provide a sufficient number of steady and honest carmen and other persons for the delivery of all coals into the cellars or any other part of the premises of the persons for whom the coals are intended, and also for collecting and receiving and duly accounting for the moneys received for the same, and for all the purposes connected with the due delivery of the coals, or receiving or accounting for the moneys for the same; and that such carmen and other parties shall, during the time they shall be in the employ of the said Edward Wiggins, his executors or administrators, obey, perform, and execute in all things connected with the carrying and delivery of coals, and receipt and payment of moneys received by them, the orders, commands, and directions of the company's coal manager, or such other person or persons as may be appointed by them for that purpose; . . . and that he, the said Edward Wiggins, or the said carmen or other parties, shall and will, day by day, and every day, well and truly pay, account for, and deliver to the said company's coal manager all checks, moneys, and cash, bills, or notes which they may at any time receive from any person or persons whomsoever, for payment of all or any coals delivered by them."

Dearsly, for the prisoner. There is no embezzlement in this case, as the prisoner did not receive the money on account of his master, but of the railway company. By the terms of the contract between Wiggins and the company, the carmen were to receive the money for, and account for it to, the railway company. The only accounting between the company and the contractor was as to the earnings of the cartage due to the latter.

[LORD CAMPBELL, C. J. The agreement under which the prisoner must be supposed to be acting seems to establish a privity between him and the company.

COLERIDGE, J. There is an absolute covenant that Wiggins or his carmen shall day by day account.]

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Read with the other parts of the agreement, that is merely a guarantee of the honesty of the carmen.

[COLERIDGE, J. It is a question whether a receipt by the hand of the prisoner was not a receipt by Wiggins.]

If, after the carman had received the money, Wiggins had said, "Give it to me," he would have been justified in refusing.

Giffard, in support of the conviction. All that the prisoner did was as the servant of Wiggins. The words "shall obey, perform, and execute," &c., can mean nothing more than that the carmen should go to the coal manager and receive his instructions about the coals, of which their master would know nothing. The company say, in substance, "We will employ an agent." But he cannot be ubiquitous; therefore he must employ servants. They are mere agents to receive the money for him. In receiving the money, the servant is simply obeying his master's orders.

[MAULE, J. If the master tells him to receive on account of the company, can he be said to receive on account of the master?]

In one sense the money may be received for the company, in another for the master, because the master has to account to the company.

[PLATT, B. The case finds that it was his duty to receive the money for the company. His duty to whom? Why, to his master.

MAULE, J. If it was his duty to his master to receive for the company, he receives on their account, and not on his master's.]

What the prisoner does is only in the capacity of his master's servant.

[MAULE, J. And in that capacity he receives a sum of money for the railway company.]

If the servant had brought back the money to the master, and he had then sent him with it to the company, it would have been larceny, the money having been reduced into the possession of the master.

[WIGHTMAN, J. If a man employs his friend's servant, with his assent, to get a check cashed at the bank, the servant would not receive the proceeds on his master's account.]

In that case there is the mere assent of the master, but here everything is done by his direction. *Baron v. Husband*, 4 B. & Ad. 611. This is not money received in the name or for, but it is on account of, Wiggins. *Regina v. Adey*, 1 Den. C. C. 571.

Dearsly replied.

LORD CAMPBELL, C. J. This case depends upon whether it was shown in evidence that the money was received by the prisoner for the company or his master. We are all of opinion that this also depends upon whether there was a privity between the company and the prisoner. If there was, so as to make him the agent of the company, and he agreed to pay the money to them when he received it from the customer, then it was not the money of the master, but of the company. The majority of the judges are of opinion that there was such a privity. The amount received cannot therefore be considered as money received on account of the prosecutor, but on account of the railway company; and that being so, the conviction was wrong.

Conviction quashed.

Regina v. Reed.

REGINA v. REED.¹

November 19, 1853, and January, 21, 1854.

Larceny — Embezzlement — Possession of Master.

The prisoner was sent with his master's cart for some coals. The coals were delivered to the prisoner and deposited in the cart, their price being entered to the master's account. On the road home the prisoner disposed of a portion of the coals:—

Held, that this was larceny of the coals, and not embezzlement, the prisoner having determined his exclusive possession of the coals when they were deposited in the cart, and the possession from that time being in the master.

At the January Quarter Sessions for West Kent, 1853, the prisoner was tried for stealing coals, the property of his master, and John Peerless was also charged in the same indictment with feloniously receiving the coals. It was proved at the trial that the prisoner Reed was in the service of the prosecutor, and on the 6th of December was sent by his master to the Southeastern Railway station at Edenbridge for a certain quantity of coals. The prosecutor was in the habit of dealing with the Medway Coal Company, who had a wharf at the above-named station. The prisoner accordingly proceeded to the station with his master's cart and some sacks; the coals were delivered to him, and entered in the company's books to the prosecutor's account. The prisoner on the road home disposed of a portion of the coals to Peerless. It was contended at the trial that there was no case to go to the jury on the charge of larceny, inasmuch as the possession of the coals parted from to Peerless had never been in the master, and that the indictment ought to have laid the offence as embezzlement. The court, being of opinion that there was constructive possession in the master, left the case to the jury upon the evidence, who thereupon found the prisoner Reed guilty, but acquitted Peerless. The point, however, was reserved, and judgment respited.

• *Ribton*, for the prisoner. This is not larceny, but embezzlement. The coals which the prisoner was charged with stealing never came into the possession of the master. In order to constitute the offence of larceny, there must be a taking from the actual or constructive possession of the owner. The first Embezzlement Act, was the 21 Hen. 8, c. 7, and is referred to in Dalton's County Justice, 144, 347. There is here clearly no actual possession. Is there a constructive possession? There are two sorts of constructive possession — first, when property is given by the master to the servant for a special pur-

¹ 18 Jur. 67. This case was argued on the 23d April, 1853, before JERVIS, C. J., PARKE B., and ALDERSON, B., WIGHTMAN J., and CRESSWELL, J.; and their lordships having differed in opinion, it was ordered to be re-argued before Lord CAMPBELL, C. J., JERVIS, C. J., POLLOCK, C. B., PARKE, B., COLERIDGE, J., MAULE, J., and ERLE, J., PLATT, B., and WILLIAMS, J., and TALFOURD, J.

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pose, or is under his charge or custody; and, secondly, where a third person has given goods to the servant to deliver to the master, and the servant has determined his own exclusive possession of them by doing some act which has vested them in the master; until the servant has done some act, such as the putting money in the till, which determines his own exclusive possession, the master has no possession, but merely a right to the possession. In *Rex v. Waite*, 1 Leach's C. C. 28; 2 East's P. C. 570, a cashier of the Bank of England appropriated to his own use some Indian Bonds which he had received for the bank, instead of putting them into the bank chest; and that was held to be no felony.

[JERVIS, C. J. The offence there was committed shortly before the act passed which made the stealing a bond a felony.]

To the same effect is *Rex v. Bazeley*, 2 Leach's C. C. 835; 2 East's P. C. 571. [He also referred to the cases of *Rex v. Dingley*, 1687; *Rex v. Bull*, cited in *Rex v. Bazeley*, *ubi sup.*; and *Rex v. Fuller*, cited in *Rex v. Mears*, 1 Show. 50.] *Rex v. Spears*, 2 East's P. C. 568; 2 Leach's C. C. 825, and *Rex v. Abrahams*, Id. 569; Id. 824, will be relied on; but they are distinguishable from the present case, inasmuch as there had been a purchase of the corn by the masters previous to its delivery to the servant; and, as is said by Mr. East, 2 East's P. C. 570, "the property of the masters in the corn was complete before the delivery to the servant; and after the purchase of it in the vessel, they had a lawful and exclusive possession of it against all the world but the owner of such vessel."

[LORD CAMPBELL, C. J. Suppose the horse had died on the road, and the coals remained in the cart, in whose possession would they be?]

As against third persons, in the master's, but not so as against the servant. In *Rex v. Walsh*, 4 Taunt. 258; Russ. & R. C. C. 215, and *Rex v. Sullens*, 1 Moo. C. C. 129, the principle is recognized, that in order to constitute larceny, the things stolen must have come into the possession of the master. Here the coals were in course of passage to the master, and had not reached their final place of deposit. *Regina v. Masters*, 12 Jur. 942; *Regina v. Watts*, 14 Jur. 870; s. c. 1 Eng. Rep. 558. In the latter case the prisoner was charged with stealing a piece of paper, (a cancelled check,) and the reason given for the decision was, that when the cancelled check came to the prisoner's hands, it had reached its final place of deposit, and therefore that the possession of the clerk was the possession of the master; and the court in their judgment, expressly distinguished that case from those in which goods are in the course of passage towards the master.

[LORD CAMPBELL, C. J. How do you define "final place of deposit?"]

What is the final place of deposit must depend upon the facts of each individual case.

[PLATT, B. You cannot contend that the cart was not in the possession of the master.]

Something else remained to be done with the coals after they were put into the cart.

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[LORD CAMPBELL, C. J. Suppose the coals had been put in a movable house ?

PARKE, B. A house is a place in which a man lives, but a cart is used merely for the purposes of conveyance.]

The final place of deposit must depend upon the nature of the goods. Thus, it was held that the putting down by a servant of a load of hay at the master's stable door was a sufficient delivery to the master to make the servant guilty of larceny in afterwards appropriating a part of it. *Regina v. Hayward*, 1 Car. & K. 518; but the coals when put into the cart cannot be considered to have reached their final place of deposit, any more than if the prisoner had worn his master's coat, and put something into the pocket. If this is larceny, then there is no necessity for the embezzlement statute, 7 & 8 Geo. 4, c. 29, s. 47; and there can be no such thing as embezzlement of chattels; for it is difficult to imagine any case which would not be nearly, if not quite, analogous.

Rose, in support of the conviction. Every larceny includes a trespass. 2 East's P. C. 554; Com. Dig. "Trespass," B. 4. The property in the coals was clearly in the master, and he had also the possession when they were delivered into his cart. If the coals had been burned, the loss would have fallen on the purchaser, and not on the vendor.

[LORD CAMPBELL, C. J. No doubt, as to third parties, the possession of the servant is the possession of the master.

ERLE, J. Would that possession be distinct from the possession of the servant ?]

Where the servant has the bare charge or custody of goods, the legal possession remains in the master, and the servant is guilty of larceny if he appropriate them. *Robinson's case*, 2 East's P. C. 565; *Rex v. Paradice*, Id.; *Bass's case*, Id. 556. Suppose the servant, after giving the order, and after the coals were placed in the cart, had gone away, saying he would return the next day, but had come in the night and taken the coals from the cart, would he not be guilty of larceny? *Spears's case* is not distinguishable. What the barge was in that case the cart is in this. The distinction between this and the cases cited is, that in no one of those cases was there any constructive possession whatever in the master before the delivery of the chattel to the servant. In *Bazeley's* and *Bull's cases* the receipt of the money by the servant constituted a mere matter of account between him and his master. *Higgs v. Holiday*, Cro. Eliz. 746. He also cited *Rex v. Harding*, Russ. & R. C. C. 125.]

Ribton, replied.

Cur. adv. vult.

Jan. 21. LORD CAMPBELL, C. J., now delivered the following judgment: I am opinion that the prisoner has been properly convicted of larceny. There can be no doubt that in such a case the goods must have been in the actual or constructive possession of the master, and that if the mater had no otherwise the possession of them

than by the bare receipt of his servant upon the delivery of another for the master's use, although as against third persons this is in law a receipt of the goods by the master, yet in respect of the servant himself this will not support a charge of larceny, because as to him there was no tortious taking in the first instance, and consequently no trespass. Therefore, if there had been here a quantity of coals delivered to the prisoner for the prosecutor, and the prisoner, having remained in the personal possession of them, as by carrying them on his back in a bag, without any thing having been done to determine his original exclusive possession, had converted them *animo furandi*, he would have been guilty of embezzlement, and not of larceny. But if the servant has done any thing which determines his original exclusive possession of the goods, so that the master thereby comes constructively into possession, and the servant afterwards converts them *animo furandi*, he is guilty of larceny, and not merely of a breach of trust at common law, or of embezzlement under the statute. On this supposition he subsequently takes the goods tortiously in converting them, and commits a trespass. We have, therefore, to consider whether the exclusive possession of the coals continued with the prisoner down to the time of the conversion. I am of opinion that this exclusive possession was determined when the coals were deposited in the prosecutor's cart, in the same manner as if they had been deposited in the prosecutor's cellar, of which the prisoner had the charge. The prosecutor was undoubtedly in possession of the cart at the time when the coals were deposited in it, and if the prisoner had carried off the cart *animo furandi*, he would have been guilty of larceny. *Robinson's case*. There seems considerable difficulty in contending, that if the master was not in possession of the cart, he was not in possession of the coals which it contained, the coals being his property, and deposited there by his orders, for his use. Mr. Ribton argued that the goods received by a servant for his master remain in the exclusive possession of the servant till they have reached their ultimate destination; but he was unable, notwithstanding his learning and ingenuity, to give any definition of "ultimate destination" when so used. He admitted that the master's constructive possession would begin before the coals were deposited in the cellar, when the cart containing the coals had stopped at his door, and even when it had entered his gate. But I consider the point of time to be regarded is that when the coals were deposited in the cart. Thenceforth the prisoner had only the custody or charge of the coals, as a butler has of his master's plate, or a groom has of his master's horse. To this conclusion I should have come upon principle, and I think that *Spears's case* is an express authority to support it. The following is an exact copy of the statement of that case, signed by Buller, J., in 2 Black Book, 182, 183, containing the decisions of the judges in crown cases, and deposited with the chief justice of the Queen's Bench for the time being:—

"John Spears was convicted before me, at Kingston, for stealing
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forty bushels of oats of James Browne & Co., in a barge on the Thames. Browne & Co. sent the prisoner with their barge to Wilson, a corn meter, for as much oats as the barge would carry, and which were to be brought in loose bulk. The prisoner received from Wilson 220 quarters in loose bulk, and five quarters in sacks, the prisoner ordering that quantity to be put into sacks. The quantity in the sacks was afterwards embezzled by the prisoner; and the question reserved for the opinion of the judges is, whether this was felony, the oats never having been in the possession of the prosecutor, or whether it was not like the case of a servant receiving change or buying a thing for his master, but never delivering it.

“Vidi Dy. 5, and 1 Show. 52.

“F. BULLER

“25th April, 1798.

“Conviction proper.”

In that case the question arose, whether the corn, while in the prosecutor's barge, in which it was to be brought by the prisoner to the prosecutor's granary, was to be considered in the possession of the prosecutor, and the judges unanimously held, that from the time of its being put into the barge it was in the prosecutor's possession, although the prisoner had the custody or charge of it. That case has been met at the bar by a suggestion, that the whole cargo of corn, of which the quantity put on board this barge was a part, was or might have been purchased by the prosecutor, so that he might have had a title and constructive possession before the delivery to the prisoner. But the very statement of the case in the Black Book, and the authorities there referred to, show that the judges turned their attention to the question, whether the exclusive possession of the servant had not been determined before conversion; and during the argument of *Rex v. Walsh*, we have the *ratio decidendi* in *Spears's case* explicitly stated by one of the judges, who concurred in the decision—“Heath, J. That case went upon the ground that the corn was in the prosecutor's barge, which was the same thing as if it had been in his granary.” Read “cart” for “barge,” “coals” for “corn,” and “cellar” for “granary,” and the two cases are, for this purpose, precisely the same. There is no conflicting authority, for in all the cases relied upon by Mr. Ribton the exclusive personal possession of the prisoner had continued down to the wrongful conversion. It is said there is great subtlety in giving such an effect to the deposit of the coals in the prosecutor's cart; but the objection rests upon a subtlety wholly unconnected with the moral guilt of the prisoner, for as to that it must be quite immaterial whether the property in the coals had or had not vested in the prosecutor prior to the time when they were delivered to the prisoner. We are to determine whether this would have been a case of larceny at common law before there was any statute against embezzlement; and I cannot think that there would have been any reproach to the administration of justice in holding that the subtlety arising from the prosecutor having had no property in the subject of the larceny before its delivery to the prisoner, who stole it, was sufficiently answered by the subtlety, that when the prisoner

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had once parted with the personal possession of it, so that a constructive possession by the prosecutor began, the servant who subsequently stole it should be liable to be punished as if there had been a prior property and possession in the prosecutor, and that the servant should be adjudged liable to be punished for a crime, instead of being allowed to say that he had only committed a breach of trust, for which he might be sued in a civil action. In approaching the confines of different offences created by common law or by statute, nice distinctions must arise and must be dealt with. In the present case it is satisfactory to think that the ends of justice are effectually gained by affirming the conviction, for the only objection to it is founded upon an argument that he ought to have been convicted of another offence of the same character, for which he would have been liable to the same punishment.

Conviction affirmed.

REGINA v. HENRY NELSON OVERTON.¹

January 28, 1854.

Evidence — Stamp — Receipt — Collateral Fact.

A document, not purporting on the face of it to be a receipt for the payment of money may be shown to be a receipt by evidence aliunde, and thus be brought within the stamp laws.

Therefore, where it was proved to be the course of business between two parties, upon the payment of money in discharge of debts due from one to the other of them, merely to get the signature of the party receiving the amount, to an entry in a book containing the date, the name of the creditor, and the amount of the debt, such entry was held to be a receipt within the meaning of the stamp laws.

Upon the trial of the clerk of the payee, who had so signed his name, for embezzling a sum of money so paid and received, the whole of such entry, though unstamped, and though referring to a sum exceeding 2*l.*, was read to the jury for the purpose of identifying the prisoner as the person to whom the money was paid, and who signed the entry: —

Held, that the entry was not admissible in evidence, as, coupled with the extrinsic testimony, it proved a material fact against the prisoner, viz., the receipt of the money, and that, for the purpose of identifying him, only the signature should have been put in and proved after it had been shown that the money was paid to the party who signed the book.

At the November Sessions of the Central Criminal Court, 1853, the prisoner was tried and convicted before the recorder of embezzling the two sums of 23*l.* 14*s.* and 14*l.* 6*s.* received by him on account of his masters. A clerk in the employment of Messrs. Shoolbred & Co. deposed to having paid two checks for those amounts, on account of the Patent Wadding Company, to a person who at the time of the payment named the amount due to his employers, and subscribed an entry in the book of Messrs. Shoolbred & Co., which was produced

¹ 18 Jur. 134. Before JERVIS, C. J., MAULE, J., WIGHTMAN, J., PLATT, B., and WILLIAMS, J.

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at the trial. This book was kept in the form of the fac-simile annexed to the case. In one of the columns were entered the names of all the creditors who had supplied the firm of Shoolbred & Co with goods ; and in the last column, and opposite to the names of the creditors, were entered all the sums due to each ; and in an intervening column was written the signature of the person who received the money at the time when each account was paid. The course of business was this, namely, when any person called for the amount due to any creditor whose name was entered in the book, he was asked the amount of the debt claimed, and if the amount thereupon named by him corresponded with the amount entered in the book, the debt was immediately paid by Messrs. Shoolbred & Co.'s clerk, and the person receiving it was required to sign his name in the middle column of the book intervening between the name of the creditor and the sum entered as the amount of the debt. No other receipt was required or taken by Messrs. Shoolbred & Co. But, on the other hand, if an entire stanger to both parties called for the debt, and mentioned the amount correctly, as entered in the book, he would receive the money upon writing his signature opposite the entry as above described. Counsel for the prisoner contended that the entry was a receipt for money, and objected, that being unstamped, (which was the fact,) it was inadmissible in evidence against the prisoner, either in whole or in part. The objection was overruled, and the entry received in evidence. It appearing that the signature was that of the prisoner, and the other necessary facts having been proved, the prisoner was convicted. The recorder, however, entertaining some doubts upon the correctness of the ruling, reserved the point ; and the questions were first, whether the entry in the book was a receipt for money within the Stamp Acts ; and, secondly, whether, being unstamped, it was improperly admitted in evidence ?

Fac-simile referred to, and annexed to the case : —

1853.				
Nov. 1	A., B., & Co.	John Doe	£1,700	£1,200
" 2	C., D., & Co.	Richard Roe	..	100
" 3	_____	_____	—	—
" 4	_____	_____	—	—
" 5	_____	_____	—	—
" 27	Patent Wadding Co. } Wadding Co.	H. N. Overton	..	{ 22 4 0 14 6 0
" 28	_____	_____	—	—
" 29	_____	_____	—	—

The above case having been sent back to be amended, the learned recorder reported as follows:—" I now state that the signature was offered in evidence by the prosecutor to prove the identity of the prisoner, and the rest of the entry was adverted to by counsel for the prisoner, without objection on the part of the prosecution. Under these circumstances I overruled the objection, and received the whole entry in evidence, in order, by means of the signature thereto, to identify the prisoner as the person to whom a witness had already proved that he had paid the checks. I ruled that the said entry

might be read in evidence for that purpose only, and it was read to the jury accordingly."

Metcalf, for the prisoner. The entry in the book was a receipt, and therefore, being unstamped, was not admissible in evidence. It appears from the case that the whole entry was put in evidence and read to the jury, and it is therefore immaterial for what purpose it was put in. In *Matheson v. Ross*, 2 H. L. C. 286, Lord Campbell, in his judgment, p. 306, lays down the rule thus — "If a document purporting to be a receipt, but unstamped, is offered in evidence during a trial, if it would be evidence when stamped as a receipt to establish any point that is litigated between the parties, it cannot be received for a collateral purpose, merely because of the party saying, 'I offer it for a collateral purpose only, so that you must take the receipt part as not written.' I think that you cannot in that manner abstract a part of a document, and give the rest in evidence. The criterion, therefore, seems to me to be, not whether the party seeks to make use of it as a receipt, but whether it can be made use of to settle any question of payment, of credit, or debit litigated between the parties." In this case, the whole entry being before the jury, the case against the prisoner might have been proved from it.

[MAULE, J. It was quite immaterial, for the purpose for which it was tendered, what the writing was, or whether it was writing at all. The circumstance of there being some words upon a paper, which, if read, might have an undue influence on the minds of the jury, will not exclude what is properly evidence.]

Here the entry proved every thing, and the prosecutor ought to have separated the signature from the entry. If this were permitted, a document which is not evidence might be put before the jury upon pretence of establishing a collateral fact, and so the whole case be proved from it.

[PLATT, B. Have you not misinterpreted Lord Campbell's judgment? He says you cannot put in evidence an unstamped receipt if you mean to settle any question of payment, of credit, or debit.]

Lord Campbell goes further than that.

[JERVIS, C. J. Suppose a penknife had been left on the counter, the witness might then have said, "I paid the money to a certain man, and when he was gone I found this penknife." The jury need not even have seen the penknife.]

The signature ought only to have been put in. He cited *Jordine v. Payne*, 1 B. & Ad. 663.

Parry, in support of the conviction. The whole argument on the other side is based upon the assumption that the entry in question was a receipt. But, first, in answer to the objections which have been urged, as regards the mode in which this entry was dealt with, it appears upon the case that it was tendered in evidence to identify the prisoner as the person who received the two checks. The question of the admissibility of a document arises at the time it is tendered, and has reference to the purpose for which it was tendered.

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[JERVIS, C. J. If the whole entry was tendered, although only for the purpose of proving the identity, it is difficult to distinguish this case from *Matheson v. Ross*; and the rule there laid down was adopted by Lord Cottenham in *Evans v Prothero*, 2 Mac. & G. 319.

PLATT, B. How can you escape from having tendered the entry in evidence? If the signature alone had been read, then it would have been clearly right; but the whole entry was afterwards read.

MAULE, J. There was no necessity even to read the signature or entry.]

Secondly, this is not a receipt within the meaning of the stamp laws.

[PLATT, B. Suppose an action had been brought for these amounts, and payment pleaded, if it had been proved that this was the Messrs. Schoolbred's mode of acknowledging payment of money, would it not have supported the plea, and amounted to a receipt?]

It must purport on the face of it to be a receipt.

[MAULE, J. In the case of an agreement, if it happens that you cannot tell by inspection whether the subject-matter is for more than 20*l.*, you may go into evidence upon the amount. It cannot be said that the stamp laws do not apply, if an agreement does not show on the face of it that it is for more than 20*l.*]

The definition of a receipt is given in the 55 Geo. 3, c. 184, sched. part 1, "Receipt"—"Any note, memorandum, or writing whatsoever given to any person for or upon the payment of money, whereby any sum of money, debt, or demand shall be expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied, or which shall import or signify any such acknowledgment, and whether the same shall or shall not be signed with the name of any person, shall be deemed and taken to be a receipt for a sum of money of equal amount with the sum, debt, or demand so expressed or acknowledged to have been paid, settled, balanced, or otherwise discharged or satisfied, within the intent and meaning of this schedule, and shall be charged with a duty accordingly." This is merely a memorandum, and does not purport or signify an acknowledgment in any way. The Messrs. Schoolbred gain nothing by adopting this course of business, as the party to whom they pay would have to give and pay for the receipt. *Rex v. Harvey*, Russ. & R. C. C. 227. Parol evidence cannot supply that which will make a document liable to the stamp laws. *Spawforth v. Alexander*, 2 Esq. 621.

[JERVIS, C. J. The course of business is to pay nobody but those who sign their names. It is proved that Overton signed his name; is not that proof of payment.]

Evidence of those facts would establish payment without the entry. The signature cannot be said to be in receipt or discharge, but it was merely for the purpose of ascertaining the identity of the person to whom the checks were paid.

Metcalf, in reply. The case finds that according to their course

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of business, the Messrs. Schoolbred required no other acknowledgment.

[MAULE, J. The words of the statute must mean, if words such as "I have received" are used, they express a receipt; but if some other word or words are used signifying or expressing the same thing, that will do as well—the word "settled," for instance, which imports a receipt.

JERVIS, C. J. If the entry had been, "For the Wadding Company, H. N. Overton," that would have imported a receipt. *Regina v. Boardman*, 2 Moo. & R. 147. So, if the words "by cash" had been used. *Wright v. Shawcross*, 2 B. & Al. 501, note. The statute relating to the forgery of a receipt must mean a receipt within the stamp laws; and in such case a document has been explained by evidence to mean a receipt. *Rex v. Hunter*, 2 Leach's C. C. 624; 2 East's P. C. 928.]

The words, "which shall import or signify any such acknowledgment, and whether the same shall or shall not be signed," show that evidence may be admitted aliunde.

[MAULE, J. This entry might prove either that the wadding company had paid Messrs. Shoolbred, or that Messrs. Shoolbred had paid the wadding company.]

We are not tied down by the definition given in the statute, which states what instruments shall be considered as receipts, but does not say that other documents shall not also be receipts.

JERVIS, C. J. I am of opinion that in this case the conviction was wrong. The question turns upon two points—first, whether the entry, of which a fac-simile appears upon the case, was a receipt; and, secondly, whether, if it was, and required a stamp, it could be used in evidence in the manner in which it was used. Upon a consideration of the Stamp Act and the authorities, I think the entry did require a stamp. A document requires a stamp which expresses or acknowledges a receipt, payment, or discharge of a sum of money, or which imports or signifies the same thing. The word "receipt" in the criminal law must mean the same thing as the receipt thus defined by the 55 Geo. 3, c. 184; and *Rex v. Hunter* clearly shows that a document simply having the signature of the party, and which on its face neither acknowledges the receipt of money or in itself imports a receipt, might by evidence of the receipt aliunde amount to a receipt, and so be brought within the meaning of the statute. Now, in this case it was proved that the course of business was, that the person who called for the amount due to any creditor whose name was entered in the book was asked the amount of the debt claimed, and if the amount named by him corresponded with the amount entered in the book, the debt was paid by the clerk, and the person receiving it was required to sign his name opposite the amount, and no other receipt was taken. Evidence, then, being admissible aliunde to explain what the entry meant, it is difficult to say that it did not import or signify a receipt; it therefore required a stamp; and if it required a stamp, it could not be read before the jury to prove a particular or

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collateral fact, when it also proved a matter distinctly in issue between the parties. The whole instrument was read, although it was tendered for a particular purpose only. At the same time it might have been legitimately used, although it did require a stamp. The proper course would have been to have put the book before the witness, and asked him whether he paid the money to the man who signed that book, and then of the next witness whether the man who signed that book was the prisoner. In this way it would have been just as much admissible as if a knife had been left on the desk, and the prisoner had been identified by means of that knife as the person to whom the checks were paid.

MAULE, J. This document, as explained by the evidence at the trial, meant this — the prisoner received a sum of money from certain persons on behalf of certain other persons. It was, therefore, undoubtedly a receipt, and required a stamp. If the reading this entry to the jury could have proved no other fact than that the signature was the prisoner's, it would have been admissible; but the jury would infer from hearing it read that the prisoner had received on behalf of his employers the sums of money mentioned in the indictment. That was a matter which it was not competent to the prosecutor to prove by means of this instrument, because it was unstamped. Then it is said that the grounds on which it was admitted were, not to prove that fact, but to prove that the prisoner was at a place at a particular time. It does not prove any such thing, but simply that the prisoner acknowledged the receipt of the money, although, however, the ultimate conclusion to which the jury might arrive would be that he was at the place. The document itself imports nothing but that he received the money. It was not for a collateral purpose that this document was used, but for a purpose in which the receipt of the money was involved. No doubt this document might have been used in the way suggested by my lord, and it would then have left the jury without any impression on their minds as to the very matter in issue; but what was done was to read to the jury an unstamped document, which disclosed a material fact against the prisoner.

WIGHTMAN, J. I had at first some doubts whether this document was a receipt, but, as explained by the evidence in the case, I think it did amount to a receipt within the meaning of the statute. I agree that it might, although unstamped, have been used for the purpose of proving the identity of the prisoner, but that it could not be legally read in evidence before the jury. The question in the case was, whether the prisoner had received the money or not, and it seems to me that this entry should not have been read *in extenso* to the jury.

PLATT, B. This was a receipt liable to the stamp laws: it was the only document between the parties, and contained a discharge. Then the whole entry was tendered and received in evidence, that whole entry being an unstamped receipt. It seems to me the objection was correctly taken at the trial. Proof of the signature alone

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was necessary to form the required link in the chain of evidence, and the signature alone ought to have been given in evidence.

WILLIAMS, J. This entry was clearly a receipt, and ought not to have been read to the jury, because it proved a most material fact against the prisoner, viz., the receipt of the money which he was charged with embezzling, and that was a matter which could not be proved by an unstamped document without violating the law.

Conviction quashed.

REGINA v. WILLIAM MOTE WATTS.¹

February 4, 1854.

Larceny—Unstamped Agreement—Chose in Action.

An agreement, although unstamped, is a chose in action, and therefore not the subject of larceny. Parke, B., *dissentiente*.

The prisoner was indicted for stealing a piece of paper. At the time it was stolen, the paper contained a signed agreement between the prosecutor and the prisoner, but it was unstamped, although of the value of 20*l*. The original was not produced at the trial, but a copy was given in evidence. The agreement was a building contract, and all moneys due under it, except some extras, had been paid; but the work was still going on:—

Held, (Parke, B., *dissentiente*,) that the piece of paper, at the time it was taken, was a chose in action, and not the subject of larceny.

THE prisoner was indicted at the Midsummer Quarter Sessions for the North Riding of Yorkshire for stealing a piece of paper. The piece of paper, at the time when it was taken by the prisoner, had written upon it an agreement between himself and the prosecutor. The agreement itself, which was unstamped, was not produced at the trial, but a copy was given in evidence, by which it appeared that it contained the terms upon which the prisoner was to build two cottages for the prosecutor; and at the time when it was alleged to have been stolen, the work was going on, but the prisoner had been paid all the money which he was entitled to under it, although there was money owing to him for extras and alterations. It was found by the case that the agreement was a document the subject-matter of which was more than 20*l*., and therefore required a stamp. It was objected at the trial, that at the time the piece of paper was taken by the prisoner it was a subsisting valid agreement, and therefore not the subject of larceny, as a piece of paper only. The question for the consideration of the court was, whether, under the above

¹ 18 Jur. 192. This case had been argued on the 21st January, and then ordered to be re-argued before the fifteen judges: Lord CAMPBELL, C. J., PARKE, B., and ALDERSON, B., COLERIDGE, J., MAULE, J., WIGHTMAN, J., and CRESSWELL, J., PLATT, B., WILLIAMS, J., MARTIN, B., and CROMPTON, J.

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circumstances, the prisoner could be convicted of stealing a piece of paper, as charged in the indictment.

Bliss, (with him *Simpson*,) for the prisoner. This is a chose in action, and therefore not the subject of larceny. If the agreement had been stamped, there would be no difficulty in the case; and the sole question now is, whether the want of a stamp makes any difference. If a piece of paper have an unstamped agreement upon it, it is a chose in action, and not merely a piece of paper. It may be said that it was enough for the jury to see that it was a piece of paper, and what was written upon it could not be read or looked at; and when this document was produced, it was necessary to look at the writing upon it, to ascertain that it was not a chose in action, but a piece of paper.

[ALDERSON, B. I cannot well see why, when a certain thing is produced, and you look at it to see that it is a piece of paper, you may not also see that it is an agreement.]

LORD CAMPBELL, C. J. It was the subject-matter of the charge, and it should be looked at to see what it was.]

Reed v. Deere, 7 B. & Cr. 261, is in point.

[LORD CAMPBELL, C. J. You need not labor that point to show that it might be looked at to see what it was.]

That case is also an authority to show that it was a chose in action. It was a valid agreement between the parties at the time, and the paper was absorbed in the agreement. Trover lies for an unstamped agreement. *Scott v. Jones*, 4 Taunt. 865. Also an action may be brought upon an unstamped agreement. *Heigh v. Brooks*, 10 Ad. & El. 309. It only requires to be stamped before, or even at the trial, that it may be used in evidence.

[PARKE, B. Is a piece of paper of value because it may be made an agreement?]

Mann v. Lent, 10 B. & Cr. 877; *Jackson v. Warwick*, 7 T. R. 121; *Rex v. The Bishop of Chester*, Str. 824. The Stamp Act does not make such a document void, but merely inflicts a penalty. *Lazarus v. Cowie*, 3 Q. B. 459; *Bradly v. Bardsley*, 14 M. & W. 873; *Brewer v. Palmer*, 3 Esp. 213.

[ALDERSON, B. The reason why you cannot steal a chose in action, as given in the books, is, that you cannot steal a man's right.]

Price, in support of the conviction. This is not a chose in action. A chose in action is defined by Blackstone, 2 Com. 397, thus—"Where a man hath not the occupation, but merely a bare right to occupy the thing in question, the possession whereof may, however, be recovered by a suit or action at law, the thing so recoverable is called a chose in action. Thus money due on a bond is a chose in action." Here all that was due under this document had been paid, and it is therefore like the case of a check or note which has been paid.

[WIGHTMAN, J. There was a claim for extras; could the prisoner have recovered for them without the agreement?]

It would have been evidence for him to reduce that debt into possession.

[MARTIN, B. Suppose an action had been brought for not building according to the specification?]

No doubt there might be a right in the prosecutor to bring his action, but that would not make this document a chose in action. It was evidence of a chose in action, but not the chose in action itself. A chose in action is a thing incorporeal, and only a right. Toml. Law Dict.

[LORD CAMPBELL, C. J. But the principal draws to it its accessory.

It makes no difference whether the document was altogether void, or at the time it was stolen it was not a valuable security. *Jardine v. Payne*, 1 B. & Ad. 663, shows that an unstamped instrument cannot be read in evidence as a security. When it once comes out in evidence that a document is unstamped, it is then no more than a piece of a paper. Under the statute relating to valuable securities, 7 & 8 Geo. 4, c. 29, s. 5, the instrument must be a perfect instrument of its kind. *Rex v. Hart*, 6 Car. & P. 106, cited in 2 Russ. Cr. 79; *Regina v. Perry*, 1 Car. & K. 725; s. c. 1 Cox's C. C. 222.

[ALDERSON, B. In *Regina v. Perry* the piece of paper was unstamped, and never could be made a valuable security.]

When it is sought to set up a document as a good and valid instrument, the court will look at it, and finding that it is not such an instrument, it then becomes a piece of paper. But even admitting that it was a chose in action, there is still good reason for holding that the prisoner was properly convicted. The old law as to choses in action rests very nearly upon one case, that of the box and charters in the Year Book, 49 Hen. 6, ff. 9, 10; and as long as the distinction existed between grand and petit larceny, there might be some reason in upholding the old law as to choses in action, but that is not so now. In 1 Hawk. P. C. c. 33, s. 35, it is said that goods, to become the subject of larceny, "ought to have some worth in themselves;" and the reason why choses in action cannot be stolen is there laid down to be, "that, generally speaking, they, being of no manner of use to any one but the owner, are not supposed to be so much in danger of being stolen." But by *Rex v. Clark*, Russ. & R. C. C. 181, the doctrine as to the necessity for value is altered. 2 Russ. Cr. 71. In *Rex v. Walker*, 1 Moo. C. C. 155, it was held that larceny might be committed of records, which did not concern the realty.

Bliss, in reply.

[LORD CAMPBELL, C. J. The court are of opinion, that, except so far as the legislature have interfered by statute, choses in action are not the subject of larceny.]

This agreement was not performed, because the work to which it related was then going on.

[PLATT, B. The short point is, whether this instrument was not a valuable agreement at law and in equity; although it was unstamped, it was capable of becoming a valuable agreement by having a stamp put upon it.]

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LORD CAMPBELL, C. J. I am of opinion that this conviction was wrong. I think that the prisoner could not, under the circumstances, be convicted of stealing a piece of paper. If the agreement had been stamped, it is admitted, and indeed there could be no doubt, that this indictment for stealing a piece of paper could not have been supported, as it would then have been a chose in action. The rule of the common law, that of a chose in action larceny cannot be committed, arises probably from this, that stealing the evidence of a right does not disturb the right itself. The legislature has recognized this doctrine by expressly enacting, that of various instruments, which are choses in action, larceny may be committed. The argument, that this document had ceased to be a chose in action, is answered by the facts stated in the case. Then comes the question as to its not being stamped; but though unstamped, it was still an agreement, and was capable of being made available as evidence of the rights of the parties. The distinction was properly pointed out by Mr. Bliss between instruments which being unstamped are wholly void, and those which may be made available by having a stamp impressed. In various proceedings an unstamped agreement may be made evidence of a right, although as an agreement, and whilst unstamped, you cannot give it in evidence. *Bradly v. Bardsley* shows that the court considered an unstamped agreement might become evidence of a right. It is quite clear, that if an action were brought upon an unstamped agreement, and there were a plea that it was unstamped, such plea would be bad. If an agreement is stamped either before or pending a trial, it may be given in evidence, and relates back to the time of signature. We must look at the condition of the piece of paper at the time the larceny was committed. It was then to be considered as evidence of an agreement; and if evidence of an agreement, then it was evidence of a chose in action, and came within the rule of the common law. There was a potentiality of the agreement being made evidence.

PARKE, B. The conviction was right. The rule of the common law is, that no instrument which is evidence of a chose in action can be the subject of larceny. This paper at the time it was stolen, in my opinion, was not evidence of a chose in action, and not available, either at law or in equity, for the purpose of proving a right, as by the stamp laws it could not be used for that purpose, but it was merely a piece of paper. I therefore differ from my lord in the view he has taken, that the potentiality of converting a chattel into evidence of a chose in action is sufficient to prevent it from being the subject of larceny, and think that a piece of parchment on which a deed is written, although it may afterwards be stamped, until a stamp is put upon it, is nothing but a piece of parchment. In the cases cited the plaintiffs could not recover, because, from the documents being unstamped, they had no evidence of their right. If a plaintiff has the power of obtaining the best evidence of his title by getting the instrument stamped, and he does not, it is his own fault; but if the instrument is lost, and is shown to have been unstamped, secondary evi-

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dence of its contents cannot be given. In this case I am of opinion, that at the time it was taken the document in question was a piece of paper, and not yet converted into a valid agreement. It was not the evidence of an agreement which the common-law rule would prevent from being the subject of larceny.

ALDERSON, B. I think that this was at the time it was stolen an agreement. If a writing only becomes an agreement at the time it is stamped, how is it that you may declare upon an agreement and get it stamped at *Nisi Prius*? The cause of action does not arise at the time it is stamped, but the document has a previous existence as an agreement, though it cannot be given in evidence until it is stamped. A chose in action cannot be the subject of larceny, because the parchment or piece of paper is evidence of a right only; so the right to land remains the same, although the title-deeds are destroyed. The reason of the rule therefore is, that the chose in action has no existence in point of law, as a piece of paper or parchment, but it must be considered as part of the right, as a piece of land, if I may so express it. I think this was in its inception an agreement relating to a right which then for the first time was created, and that it had no existence as any thing else but a right, and that right remains untouched notwithstanding the act of the prisoner.

COLERIDGE, J. I am of the same opinion. It is admitted that the prisoner could not be convicted if the chattel was absorbed in the agreement. I think this was not merely a piece of paper. The court would look at it to see what chattel it was, and when looked at, they would see it was that which purported to be an agreement, and, but for the Stamp Act, the only evidence of the chose in action to which it related. If an action had been brought, and it had transpired that there was a written agreement, parol evidence would have been excluded; but then it was quite capable of being made admissible in evidence, and when so made admissible, it would not thereby acquire a new character. It was an agreement, the evidence of a chose in action, but is then made admissible in court for that object when a stamp is applied. A piece of paper with the matter of an agreement written upon it, but not signed, is merely a piece of paper, and nothing more; but the moment it is signed, it then becomes an agreement. The only object of the stamp laws is to enforce the duty, by making a document not available in evidence without a stamp.

Maule, J. The conviction was wrong. This document, although unstamped, was still an agreement: it was evidence of a contract which had been entered into between the parties. It referred to a right of action, and a right of action is not the subject of larceny; neither is the paper which is evidence of it.

WIGHTMAN and CRESSWELL, JJ., concurred.

PLATT, B. This was an agreement, though no stamp was put

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upon it. If an action had been brought upon it, it might have been stamped as an agreement between the parties. It became an agreement the moment it was signed, but it would not be available in evidence for the party tendering it till it was stamped. The manner in which the objection is always taken at *Nisi Prius* shows this. The question is put to a witness, whether there is not an agreement in writing; if the answer is "yes," it must be put in; and then, if it is found to be unstamped, it is excluded upon that ground alone.

WILLIAMS, J., MARTIN, B., and CROMPTON, J., concurred.

Conviction quashed.

CASES

ARGUED AND DETERMINED

IN THE

HIGH COURT OF ADMIRALTY;

DURING THE YEARS 1853-54.

THE CYNTHIA ANN.¹

June 21, 1853.

Collision — Costs of References to Registrar and Merchants.²

THIS was also an application for the costs of the reference to the registrar and merchants. The bark Colony and the brig Cynthia Ann came into collision in the Winterton Roads in January. An action was entered on behalf of the owner of The Colony, and the damage being admitted, the usual decree was made. The claim amounted to 275*l.*, and consisted of three items. The sum allowed by the report was 91*l.* Two of the items, for fees and bills paid, were allowed; the third item was reduced from 243*l.* to 60*l.* It appeared that The Colony, after the collision, proceeded to Carthagená, where she was surveyed under the direction of the British consul, and the estimate came to 243*l.* The bark, however, was not repaired at Carthagená, but went to the sea of Azof, returned to England, and sailed thence to New Orleans.

Bayford, for the owners of The Cynthia Ann, submitted that the claim having been reduced three fourths in one item, and the report not objected to, must be taken to have been excessive; that no opportunity was offered of surveying the bark in England, though an offer had been made by the owners of The Cynthia Ann to repair her at their own cost; and the case was one in which the court might condemn the owners of The Colony, not merely in the costs of the reference, but in the costs of the suit.

¹ 17 Jur. 768.

² See *The Nimrod*, post.

The Montreal.

Deane, contra. The court will not rescind its own decree, by which it pronounced for the damage, and condemned the wrongdoers in the costs. As to the reference, the circumstances made it unavoidable. The only *constat* of damage which the claimants had was the survey and estimate of Carthagena. Admitting Carthagena to be an expensive place for repairs, yet they had a right to have the ship repaired there; and as no fraud is charged, and no tender was made, they had a right to rely upon that estimate, and should not be condemned in costs because merchants in England think a ship may be repaired here cheaper than in Spain. At all events, the court will do in this case as in *The Nimrod, post*, and only give the costs of the one item reduced.

DR. LUSHINGTON. The circumstances must be very strong which would induce the court to alter its original decree, condemning *The Cynthia Ann* in the costs of the former proceedings, and I am not disposed to do it. But with regard to the reference to the registrar and merchants, the case stands thus — the sum demanded was 275*l*, the amount allowed 91*l*, making a difference of 184*l*. It certainly does appear to me, unless the reason of this deduction could have been accounted for in the most satisfactory manner, that it will be the duty of the court to condemn a party making a claim of this description, utterly unsupported by the evidence, in the costs, and for this reason, it prevented the other party from making a tender. I therefore condemn *The Colony* in the costs of the reference, and of this motion.

THE MONTREAL.¹

March 24, 1853.

Collision — Both Vessels in Fault — Pilot in Charge of one under Local Act — Costs.

In a collision, where the court, assisted by Trinity Masters, decided that both vessels were to blame, but that with respect to one of them the blame was to be attributed to the pilot, who had been taken on board under a local (Liverpool) Pilot Act: —

Held, that such vessel was not to contribute to the loss; and with respect to costs, that each party must pay his own costs.

DR. LUSHINGTON. In this case it has been determined by the court, in concurrence with the Trinity Masters, that both vessels were to blame for the collision that occurred. According to the ordinary course of the proceeding, the damage and costs would, therefore, be paid in moieties by both parties. The collision took place in the river Mersey. Assuming *The Montreal* to blame, the owners have

The Montreal.

alleged, that whilst the vessel was off point Lynas she took on board a duly licensed pilot of the port of Liverpool; that at the time of the collision the pilot had entire charge of the vessel, and all his orders were obeyed; and the Trinity Masters have found (and the court agrees with the finding) that the blame attaching to *The Montreal* is exclusively the fault of the pilot, and not of the master and crew. The question, therefore, is, whether, under the Liverpool Pilot Act,¹ (for I do not mean to advert to the general Pilot Act,) the owners of *The Montreal* are released from the responsibility of contributing to the damage that occurred. Now, this question, in my opinion, turns upon the point, whether, under the Liverpool Pilot Act, it was compulsory upon the owners to take a pilot or not. If compulsory, the owners are relieved from all responsibility; if the taking the pilot was voluntary, then the responsibility would remain. It is clear from that act of parliament that this vessel was bound to take a pilot for the purpose of entering the port of Liverpool; but it is contended that she was not bound to have a pilot at the time of the collision by any of the provisions of that act. The pilot was taken on board on the 25th November to pilot the vessel to the Queen's

¹ Liverpool Pilot Act, 5 Geo. 4, c. 73. Sect. 25. "And be it further enacted, that in case the master or commander of any ship or vessel, inward bound, shall refuse to take on board and employ a pilot, so to be licensed as aforesaid, who shall offer his services, (except such as shall be in ballast in the coasting trade, or be under the burden of 100 tons,) such master or commander shall pay or cause to be paid to the pilot who first, or who only, shall offer his services as aforesaid, and shall be so refused, the pilotage, according to the different rates and prices hereinbefore directed to be paid, as if the said pilot had been received and employed in conducting or piloting such ship or vessel into the said port of Liverpool."

Sect. 32. "And be it further enacted, that every pilot, to be licensed as aforesaid, who shall pilot or conduct any ship or vessel into the said port of Liverpool, is hereby required to take care (if need be) to cause such ship or vessel to be properly moored at anchor in the river Mersey, and afterwards to conduct such ship or vessel into one of the wet docks within the said port, without being paid any other rate or price than is hereby directed to be paid for the piloting or conducting such ship or vessel into the said port of Liverpool; but in case such attendance shall be required during such ship or vessel being at anchor in the river Mersey, and before she is docked, 5s. per day shall be paid; provided always, that this act shall not extend to prevent or hinder the master, or other person having the command of any ship or vessel in the coasting trade being in ballast, or any ship or vessel in the coasting trade being under the burden of 100 tons, by the certificate of registry, from conducting or piloting his said ship or vessel into or out of the said port of Liverpool, nor to hinder any person or persons from assisting any ship or vessel in distress, nor to subject any such person or persons to any of the penalties of this act; any thing herein contained to the contrary thereof in anywise notwithstanding."

Sect. 34. "And be it further enacted, that if the owner, master, or commander of any ship or vessel shall require the attendance of a pilot, licensed as aforesaid, on board any ship or vessel during her riding at anchor, or being at Holeyake or in the river Mersey, such pilot shall attend such ship or vessel, and be paid for every day he shall attend, 5s., and no more; provided always, that in case such pilot shall not be employed the whole day, but be dismissed in less than a day, such pilot shall be paid 5s. for his attendance; provided also, that the pilots, so to be licensed as aforesaid, who shall have the charge of any ship or vessel, shall be paid for every day of their attendance whilst in the river, except the day of going to sea with such ships or vessels as shall be outward bound, and the day of returning from sea and the day of docking for such as shall be inward bound."

The Hædwig.

Docks at Liverpool; the ship arrived in the river Mersey on the 26th November, and anchored off the Albert Dock wall between eleven and twelve, A. M., it being too late to enter the Queen's Dock with that tide. She remained at anchor till the flood tide had made, when, having a steam-tug to assist, she proceeded at about eleven o'clock up the river, and in so proceeding the collision occurred. Now it is alleged that the compulsory employment of the pilot ended when the ship anchored off Albert Dock wall. I have carefully referred to all the enactments bearing upon this question in the Liverpool Pilot Act, especially to the 32d section, and I am clearly of opinion that the fact of the vessel anchoring off the Albert Dock wall — a necessary measure before she could be conveyed into the Queen's Dock — was no interruption of the original agreement, and in no degree rendered the employment of the pilot from the Albert Dock wall to the Queen's Dock a voluntary measure; it was one continued service, which the pilot was bound to perform, and for which the master was bound to take a pilot; and it would be almost absurd to hold, looking at the terms of the act of parliament, that that service ended upon the mere entrance into the port of Liverpool, and before the vessel was docked. I am, therefore, of opinion that at the time of the collision the pilot was compulsorily employed; that the whole blame, as related to The Montreal, was his; that The Montreal is not liable to contribute to the damage occasioned thereby; and that each party must pay their own costs.

 THE HÆDWIG.¹

April 29, 1853.

Salvage — Tender — Costs.

From the evidence in a cause of salvage it appeared that before a tender of 30*l.* was made the salvors had refused an offer of 80*l.* for their services. The court, awarding 50*l.*, and overruling the tender, gave no costs.

THIS was a cause of salvage by the master, the owners, and the crew of The Ramona, of Yarmouth, a fishing lugger of about fifty-three tons burden and eleven hands, for services rendered to The Hædwig, a schooner of about sixty-nine tons, bound on a voyage from Gottenburg to Hull, with a cargo of timber and iron. The value of the property salvaged was 860*l.* A tender of 30*l.* had been made and rejected. The facts appear in the judgment.

Haggard and Jenner, appeared for the salvors.

Addams and Robinson, for the owners.

¹ 17 Jur. 977.

DR. LUSHINGTON. In this case a tender of 30*l.* has been made, and of course, in order to form an opinion whether that is a sufficient tender or not, the court is bound to look at and to consider all the circumstances of the case, as they appear in evidence, and, as usual, it is not a very easy matter to ascertain the truth where the statements on each side are so very conflicting. I think, on the present occasion, the difficulty is in some degree enhanced by circumstances to which I am about to advert. It appears that the value of this vessel is 860*l.*, and the service, whatever may be its nature, lasted about twenty-four hours. In cases of this kind the court is in the constant habit of looking to the protest, but always with doubt and hesitation as to what consequences are fairly to be drawn from it, because it frequently happens that its contents depend much upon the notary public who draws it, whether he extracts all the necessary facts ; in short, whether it be a perfect or an imperfect document. Upon the present occasion, the protest is as full as is necessary for the purpose ; but when the court was about to consider it as a fair statement of the whole case, it was met with this most unexpected obstacle — that it is denied by the master and the mate that it is a true protest. The master and mate swear in their affidavit that they well understand sea terms and general ordinary conversation in the English language ; and I suppose, upon the faith of that, they make their protest in the English language, not, so far as appears, by interpretation. In the affidavit, exonerating themselves, or attempting so to do, from certain statements therein contained, they say that, from inadvertence and mistake — that is, from their partial or imperfect knowledge, according to their own words, of the English language — certain words have been omitted. This statement is in no degree confirmed by the notary public, who ought to take care that there is no mistake in the protest, and that the whole instrument is understood. If he does not see that it is understood, he deserts the duty of the office which he is sworn to perform, and instead of assisting the court, necessarily leads it into doubt and difficulty. However, for very many purposes, I think myself fully justified in relying on this protest as containing a fair statement of the case. It states the damage which was done to this vessel. On Monday, the 4th October, the top-gallant sail was split. On Thursday, the 7th, the wind had shifted to north-west. Appearers' said vessel shipped a heavy sea, which broke seven stanchions on the starboard side, and stove in and carried away all the bulwarks from the bows to the mainmast, knocking down and disabling two of the crew ; and large quantities of water having washed down the hatchways, it was necessary to set the pumps on, and keep them constantly going." It states further, that "about half-past six o'clock, P. M., of the same day they shipped another heavy sea on the larboard side, which broke one stanchion and carried away a portion of the bulwarks, and stove in the upper streak of one of the small boats on the deck, again shipping at the same time large quantities of water down the hatchways, it being still necessary to keep the pumps constantly at work." They further say, "that the pumps were so kept constantly at work till about

The Hædwig.

four o'clock the next day, the 8th, when they observed a fishing boat, and hoisted a flag to the foretopmast for a pilot; that about an hour afterwards the fishing boat came alongside, the wind blowing a gale from north-west-and-by-north; that appearers hailed them; that they wanted one man to pilot the vessel." These are the facts stated in the protest. There is another document to which the court always looks when it is produced for its consideration, namely, the report of the facts taken before the receiver of droits. On this occasion the court is placed in this predicament: two copies of it differ one from the other—in one respect not material, in another it might be of very considerable importance. The omission in one is as to the statement, "as far forward as the mainmast." We all know that in cases of this kind the variation of a few words will alter the whole sense, meaning, and effect. And again, in a subsequent part, where they state "they would leave that to the consul on shore;" the other copy of the report before the receiver has no such words. I mention this, because though these errors cannot seriously affect the judgment of the court, yet it is absolutely necessary that something should be done to prevent them in future. If there be any good at all in the Wreck and Salvage Act—if it does not do more mischief than service—it is in taking these reports *recenti facto*; and if taken with great care and with perfect impartiality, I apprehend they would be of considerable use in assisting the court to come to a right conclusion. The vessel, then, having sustained damage, and two of the crew having received considerable injury, a signal was hoisted; and accordingly, the rule which I shall always follow, I hold it to have been a signal for assistance, and not for a pilot. But again; what was the nature of this case? Was it a case in which the words "pilotage" or "pilot," could with safety and propriety be applied? Why, the vessel was thirty-five miles out at sea. There are no pilots to be found there; she was out of pilotage ground altogether. It is true, the vessel might require nothing but to be conducted to a place of safety; but that is not pilotage, it is a salvage assistance. Then, in looking to it as a case of salvage, of course I come to consider the value of the services rendered. I do not apprehend that the vessel was in imminent danger; and, according to the statement of the salvors as to the wind, it never could have brought her on the English coast. They say it blew a gale from the north-north-west till twelve o'clock, when it veered and came back to north-north-east. So far as the court can form an opinion, there was no possibility of the vessel coming on any part of the coast. The court will also be governed by the value of the services rendered, and not by an ingredient imported into this case, namely, the alleged loss of the salvors. I think that the service rendered was of a salvage nature, deserving a fitting reward, for the use of the vessel herself and for the detention of the crew; but if it be attempted, as has been done in this case, to say, "We could have got, in the herring fishery," the enormous sums which are stated in these affidavits, then, I repeat, no such sums ought to be awarded, unless there was a full statement made to the foreign master, proved to my satisfaction, that if the case came here,

The Panther.

the demand would be to the immense extent made on the present occasion. I shall entirely reject from my mind all these affidavits as to the alleged value of the fishery; and not only because it would be a fraud on the foreign master to have effected the service without such disclosure, but also for another reason. I find it stated by the salvors that there was a heavy gale blowing the whole time. I find that when the service commenced they were at anchor; and I do not believe, if their affidavit be true, that they would or could have fished at all. Still, I am of opinion that this was a service entitled to be rewarded by a larger sum than the 30*l.* tendered. Leaving out of consideration all the supposed gain in the herring fishery, the judgment of the court will be to overrule the tender, and give the sum of 50*l.* But when I see it sworn by the salvors themselves, in their own affidavit, that 80*l.* was offered, and they refused it, I shall give them no costs, more especially when I look to the pretended value of the herring fishery. The next time salvors come before me with statements as to the herring fishery, I think they will have reason to remember it.

THE PANTHER.¹

May 25, 1853.

Collision — Rule of Navigation — Lights.

THIS was a suit for damage, by plea and proof, promoted by The New Union, a schooner of 162 tons burden, against The Panther, a steamship of 292 tons, belonging to the General Steam Navigation Company. The schooner was bound from London to a port in the Persian Gulf, with a general cargo of merchandise; the steamer was bound from Ostend to London with a general cargo, and about twenty passengers. The loss sustained by the schooner was estimated at about 18,000*l.* The libel on behalf of the schooner pleaded, in substance, that about six o'clock, A. M., of the 18th December last, she was in mid-channel, and about a mile above the Nore light, on the port tack, heading east-south-east, with a wind from north-by-east, and the morning clear; that while the crew were setting the reefed mainsail, the pilot, who was on the port bow, and the master, who was at the wheel, observed the two paddle-box lights of the steamer, distant about a mile, a little on the starboard bow, and rapidly approaching; that by order of the pilot the helm of the schooner was immediately put hard a-port, and was so kept until after the collision; that she thereupon fell off several points; that the pilot loudly hailed the steamer to port her helm, but no notice thereof

The Panther.

was taken by those on board; that shortly afterwards the steamer, without altering her course, ran stem on with full speed into the schooner, cutting her down below the water's edge; that the pilot, master, and crew thereupon got on board the steamer; that within a minute or two after the collision the steamer backed clear of the schooner, and a boat having been lowered, the master, pilot, three of the schooner's crew, and two of the steamer's, boarded the schooner and found six feet of water in her hold; that she was thereupon towed by the steamer to Shoeburyness, on the coast of Essex, where, being nearly full of water, she grounded on the sand; that the collision, and the damage consequent thereon, are imputable solely to those on board the steamship Panther, to wit, from the want of a good look-out or otherwise on board that vessel, and not to any misconduct of any description on the part of those on board the schooner New Union, &c. The allegation on behalf of the owners of The Panther pleaded, in substance, that about a quarter past five, the wind blowing very heavy from the north-west, and the morning extremely dark, she passed about half a mile to the northward of the Nore light, and proceeded up the river, her course then being about north-west-by-west half west; that when about three miles above the Nore light, at about a quarter before six o'clock, the schooner New Union was seen from her distant about half a mile, and about two points on her starboard bow, running down with the wind (which still blew strong from about north-west) free on her larboard quarter, and the tide then about half an hour ebb, and still well open on the steamship's starboard bow; that had the two vessels continued such their courses no collision could have occurred, but that, when within about three or four ship's lengths from the steamship, the helm of the schooner was put hard a-port, which brought her athward the tide, and right across the track and bows of the steamship; that the helm of the steamship was thereupon immediately also put hard a-port, and the engines stopped and reversed, by direction of her commander; that, notwithstanding, the schooner almost immediately, with her larboard quarter near the main chains, came in contact with the stem of the steamship (although her engines at such time had made three or four revolutions astern) with much force; that at such time there was a good look-out kept on board the steamer, and three lights burning, in pursuance of the provisions of the 14 & 15 Vict. c. 79, s. 26; that at such time the schooner did not, as required by the said orders, show a bright light, or any light, in any position that could be seen by those on board the steamship; and that the collision was occasioned by her non-observance of the said orders, and is not in any sort of degree imputable to the steamship, or to any one on board her, but that the same is imputable solely to those on board the schooner, to wit, for their non-observance of the said orders, and for their unskilfulness and unseamanlike conduct in putting her helm hard to port, and thereby bringing her right across the track and bows of the steamship when within three ship's lengths of her, and which, if they had not done, from the then relative positions of the two vessels, no collision would or could have occurred.

The Panther.

Haggard and Twiss, for The New Union.

Addams and Robinson, for The Panther.

DR. LUSHINGTON, addressing the elder brethren. Gentlemen, the action in this case has been entered at a very large amount, and though I would fain hope that the loss has in some degree been exaggerated, yet there is no doubt, that, upon whomsoever it may fall, it will be exceedingly heavy. I think it is essential that we should, in the consideration of this case, keep the merits or demerits of the two vessels as distinct as possible. The statement of The New Union is, that the collision took place about six o'clock on the morning of the 18th December, in mid-channel, about a mile above the Nore light-ship, and that her course was east-south-east, and the wind north-and-by-east. The Panther represents the wind to have been north-west. There is a great difference as to the quarter from which it was blowing, but whether that is of the slightest importance in this case, is a matter for your consideration. It appears that the tide was at that time about half an hour's ebb. The New Union had on board a regular Trinity House pilot. There is a difference between the parties as to the precise state of the weather; the one represents it as a dark morning, the other as clear. But I apprehend we may take it to have been an ordinary morning for that season of the year.

The New Union goes on to state that the steamer was seen about a mile ahead, on the starboard bow; and the steamer says that she saw the schooner two points on her starboard bow. The New Union states that she immediately ported her helm, and fell off several points, but the steamer, keeping her course, ran into her, and struck her on her port-beam. It is admitted on all hands, that previous to the collision all the crew of the New Union, with the exception of the cook, were employed in reefing the mainsail; that the pilot was on the look-out, and the master was at the helm. The defence is to the following effect: That the wind was from the north-west, and that the course of the steamer was north-west-by-west half west, and that the collision took place by reason of the schooner having ported her helm, since they would not have touched each other if they had kept their courses. It is alleged that the steamer, having observed that the schooner had ported her helm, then, and not before, also ported her helm. Then it is averred that no light was shown on board the schooner, which is an admitted fact. Let us consider a little what is the law applicable to this question, as now laid down by the act of parliament, 14 & 15 Vict. c. 79, because, whatever doubts may have existed previously, that act must be obeyed. The 27th section enacts, that "whenever any vessel proceeding in one direction meets a vessel proceeding in another direction, and the master, or other person having charge of either such vessel, perceives that if both vessels continue their respective courses they will pass so near as to involve any risk of a collision, he shall put the helm of his vessel to port, so as to pass on the port

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side of the other vessel." In order to call for the observance of this rule, both vessels must be in that situation, that if they continue their respective courses they will pass so near as to involve a risk of collision. If there be any probability whatsoever of a collision, then it is the duty of each vessel to put her helm to port. It appears that the schooner did put her helm to port, and we have to consider whether the circumstances were such as to bring the steamer within the rule. But there is another question arising out of a part of the act which applies to a steamer only; and in considering this, you will bear in mind that the Panther, previous to the collision, was about mid-channel. The words of the act are: "And the master of any steam-vessel navigating any river or narrow channel shall keep, as far as is practicable, to that side of the fairway or mid-channel thereof which lies on the starboard side of such vessel; and if the master or other person having charge of any steam-vessel neglect to observe these regulations, or either of them, he shall for every such offence be liable to a penalty." Consequently you will have to consider whether the steamer at this time ought not to have been further on the north or Essex shore. The question, then, will be—first, whether the steamer was to blame for not keeping closer to the Essex shore; secondly, whether she ought not to have ported her helm as soon as she saw the schooner; and, thirdly, whether, if she had so ported her helm, the collision would have taken place, it being certain that the schooner did port her helm. The master of the steamer says that it would inevitably have taken place; but that is a matter of opinion, not of fact. You will also have to consider the shortest distance at which the steamer is represented to have first seen the schooner, being half a mile—whether, if she had then ported her helm, she would not have avoided the collision. With regard to the schooner, it is an admitted fact that she did not show a light when she saw the steamer; and it is abundantly clear to my mind that the rule to do so was, under the circumstances, binding upon her. But what is the construction to be put on the act of parliament upon this point? This question of law it is my duty to decide. The 28th section is in these words: "If, in any case of a collision between two or more vessels, it appear that such collision was occasioned by the non-observance of either of the foregoing rules, with respect to the passing of steamers, or the exhibition of lights, the owners of the vessel by which any such rule has been infringed shall not be entitled to recover any recompense whatever." A case was cited at the bar in which Pollock, C. B., said, that at common law this made no alteration from the old law. See *Morrison v. The General Steam Navigation Company*, 17 Jur. 507; s. c. 20 Eng. Rep. 455. I am not inclined in the slightest degree to differ from the construction which he has put upon the act. He said that if the neglect of the rule was the occasion or cause of the collision in whole or in part, there could be no recovery. Accordingly the question which I put to you is, whether you are of opinion that the collision was occasioned, either in whole or in part, by the schooner omitting to show a light. It is necessary for us to be rather particular in affixing a meaning to the

The Nimrod.

word "occasion." It has been averred by the Panther that the collision was occasioned by the non-observance of the order as to a light; but with respect to evidence on that subject, there is next to none, and you will have to consider whether, in point of fact, the absence of a light altogether did occasion this collision, or whether it did not take place solely and entirely in consequence of the steamer not porting her helm, provided that she ought to have adopted that measure. In order that we may not leave any point untouched which is important in the case, I mean to request your opinion upon this last question, — whether the collision was occasioned solely by the fault of the Panther in not immediately porting her helm when she saw the schooner half a mile off? There is one other matter I think it right to mention, — was there a proper look-out on board the schooner? It is unquestionably true that the only look-out was the pilot; but the question is, whether there was a sufficient look-out to ascertain that a vessel was coming, in time to avoid it?

Having taken the opinion of the Trinity Masters,

DR. LUSHINGTON said: The first question which I addressed to the Trinity Masters was in these words: "Ought not the steamer to have ported her helm as soon as she saw the schooner?" The answer is, "She ought." Secondly, "If the steamer had ported her helm as soon as she saw the schooner, half a mile off, would the collision have taken place, it being certain that the schooner did port her helm?" Answer, "Certainly not." Thirdly, "Was the collision occasioned, in whole or in part, by the schooner omitting to show a light?" Answer, "Certainly not; for, according to the statement of the steamer herself, she saw the schooner in ample time to have avoided the collision had she immediately ported." Fourthly, "Was there a sufficient look-out on board the schooner?" Answer, "Under the circumstances the look-out was sufficient; the steamer was seen in time, and proper measures were pursued in time." Fifthly and lastly, "Was the collision occasioned solely by the fault of the Panther, in not immediately porting her helm when she saw the schooner half a mile off?" Answer, "Yes." I pronounce against the Panther.

THE NIMROD.¹

May 25, 1853.

Collision—Costs of Reference to Registrar and Merchants.

The claim made in a damage cause was 3,121*l*. The report allowed 1,736*l*. A tender was made before the reference of 1,685*l*. The four principal items disallowed amounted to 1,109*l*. Claimants condemned in the cost of the reference as to these four items.

¹ 17 Jur. 767.

The Nimrod.

THE collision whence arose the damage and reference to the registrar and merchants herein occurred on the 13th May, 1851, at the mouth of the river Mersey, and the two vessels which came into collision were The Nimrod and The Genova. The Nimrod (the vessel proceeded against) was a steamship trading between Cork and Liverpool, and was at the time of the collision bound out of the Mersey for Belfast. The Genova (the vessel sustaining the damages pronounced for by the court, and which had been referred to and reported on by the registrar and merchants) was also a steam-vessel, and one of a line of steamers trading between Liverpool and the Mediterranean, and at the time of the collision was just entering the Mersey, home-bound for Liverpool. The Genova was got into the Prince's Basin at Liverpool, where her cargo was discharged, and preparations made for repairing her there, but the orders given to that effect were countermanded, and having been temporarily repaired at Liverpool, she was taken round to the Clyde for the completion thereof, for which purpose she left Liverpool on the 22d May, and on the 20th June left the Clyde for Liverpool. The claim of the owners of The Genova for damage and losses amounted to 3,121*l.* 19*s.* 3*d.* This amount appeared so exorbitant that it was determined on the part of the owners of The Nimrod to make such a tender as was deemed ample to compensate the owners of the Genova for the losses they had sustained, and accordingly on the 13th September, 1852, the proctor of the owners of the Nimrod brought in 1,685*l.* 6*s.* 8*d.* as a tender for the losses sustained; but this tender was rejected, and the claim of 3,121*l.* 19*s.* 3*d.* adhered to; consequently it became necessary to proceed with the reference, for which purpose affidavits and counter-affidavits were filed, and several meetings having been held with the registrar and merchants, and the claim contested, the registrar, on the third session of Easter term, (the 4th May, 1853) brought in his report as to the matters, reducing the claim from 3,121*l.* 19*s.* 3*d.* to 1,736*l.* 2*s.* 7*d.*

Addams now applied for the costs of the reference, submitting, that were so large a proportion of the claim was disallowed, the parties who had successfully resisted an exorbitant demand were entitled to the costs of their defence, especially when a fair tender had been made.

Twiss, contra, contended that there was a distinction between cases of bottomry and damage, as regarded the reference, and that in damage cases the reference was a matter of right, to be paid for by those who did the damage. That as to the tender, the amount reported exceeded that, and therefore the owners of the Genova were justified in refusing the tender.

DR. LUSHINGTON. I am of opinion that there is a distinction between a reference to the registrar and merchants in a question of bottomry and in one of damage. With respect to bottomry, persons who go to a reference ought to be provided with the charges which

they mean to prefer. These are charges already incurred, disbursements made, and the accounts ought to be fair and accurate — not binding them down too tightly in that matter. I should always be disposed, in questions of bottomry, wherever I find that in a reference to the registrar and merchants a considerable sum has been demanded over and above that which the bondholder was fairly entitled to, to compel him to pay the expenses of that reference. With respect to cases of damage there is this difference: it is difficult to lay down a positive rule whereby you can ascertain the damage done to the ship or cargo in consequence of collision. It frequently happens that there are many items to take into consideration, of which the person who has received damage cannot make a precise estimate, and which may be fair matter of dispute and discussion before the registrar and merchants, and which discussion the person so receiving damage — the person damnified in the case, considering its nature — is fairly entitled to raise and to complain of, at the cost of the wrongdoer. These are general principles on which the court will act. On the present occasion I entirely discard the circumstance of a tender having been made, because I am of opinion, that it being less than the registrar and merchants allowed, it was perfectly competent to the party to reject it, to go before the registrar and merchants, assert all proper claims before that tribunal and have them discussed and decided; therefore, I again say, with respect to the tender, I have nothing to do with it. But although, with respect to a claim for damage, I hold it to be different from that for a bottomry bond, yet I am by no means disposed to come to the conclusion that it is the right of a party receiving damage to make preposterous demands, exposing the other side to considerable expense. Wherever the court finds a party so conducting himself with respect to items preferred in a claim for damage, I think, in justice to the other party and the public — for the public have an interest in justice being administered — I ought to take cognizance of it. I am therefore called upon to decide, on their individual merits, the different items allowed by the registrar and merchants. There is a considerable amount disallowed — no less, in round numbers, than 1,300*l*. I must presume that the report of the registrar and merchants is well founded in every respect, it having been confirmed, and not objected to. When I look to these items, I think they could hardly have been advanced with a very *bonâ fide* conviction on the part of the vessel run down that she had a right to have them established. I find, for repairs to enable the *Genova* to proceed to the Clyde, a claim of 87*l*. 2*s*. 11*d*.; the amount allowed 24*l*. 3*s*. 2*d*. I am entitled to assume that justice was done; consequently there was an extravagant claim, which the party had no business to make. Passing over some other items, I go to another part of the report, which is to the following effect: — Bills for taking the *Genova* to the Clyde: repairs there, and taking the ship back to Liverpool, 442*l*. 17*s*. 5*d*.; allowed, 296*l*. 2*s*. 2*d*.: there is 150*l*. rejected out of a demand of 442*l*. Then, going to the conclusion of the accounts, I find two items disallowed, amounting to no less than 900*l*., part of which was a claim for the loss of earn-

The Nimrod.

ings on account of the Genova having been kept from sailing, in consequence of the collision, until the 28th June. The registrar and merchants have disallowed this, as I understand, because the vessel was not kept in consequence of the collision, and the claim has no foundation. I have no doubt the registrar and merchants proceeded, as they should proceed, on the principle of giving a full and complete indemnity for any loss sustained — to that the owners are entitled, and nothing more. Having adverted to these items, the determination to which I have come is this, that I shall condemn the party in the costs of the reference as to those four items. The rest will follow the usual course. I also give the costs of this motion.

CASES

ARGUED AND DETERMINED

IN THE

ECCLÉSIASTICAL COURTS

AT

DOCTORS' COMMONS;

DURING THE YEARS 1852.

PREROGATIVE COURT.

CRANE v. REBELLO.

April 20, 1852.

Insolvent Estate — Right of Residuary Legatee to Administration with Will annexed as against a Creditor.

The residuary legatee and next of kin of a testator has a right to administration with the will annexed, in opposition to a creditor, though the estate is alleged to be insolvent, and the creditor is supported by the other creditors of the estate.

THE deceased died in September, 1851, leaving a will, of which he appointed C. D., executor, and his (the testator's) son, F. C., residuary legatee. C. D. renounced probate, and administration with the will annexed was applied for on behalf of F. Rebello as a creditor. The grounds of this application, as contained in the act of petition, were — that the estate of the testator was insolvent, the debts and liabilities greatly exceeding the assets; that F. Rebello was a creditor, and that other creditors had consented to the administration being decreed to F. Rebello, rather than to F. C.; and that F. C. was wholly unfit and incompetent to administer the estate. On the part of F. C. the

Crane v. Rebello.

incompetency was denied, and the practice of the court in respect to grants of administration was relied upon.

Harding, Q. A., for F. Rebello.

Addams, for F. C.

Sir J. Dodson. It is the general rule that administration shall be granted according to the interest, as well in cases within as without the statute, the court intrusting the management of the estate to those who have the greater interest. Hence, where no executor is appointed, or where the executor will not act, the residuary legatee is preferred to a next of kin; and this, the established practice of these courts, has been approved and sanctioned by other courts. With respect to creditors, it has been held that they have an inferior interest; that they cannot deny an interest or oppose a will. *Dobbs v. Chisman*, 1 Phillim. 159. And administration is granted to them only on failure of prior interests. They are postponed to residuary legatees, next of kin, and legatees; and the solvency or insolvency of the estate cannot affect the question of right, particularly in the case of a residuary legatee, who is the testator's choice. *Atkinson v. Barnard*, 2 Phillim. 316. I cannot supersede his right, nor institute an inquiry into the state of the assets; and I may here notice *Graham v. Maclean*, 2 Curt. 659, where Sir H. Jenner held, that he "could not grant administration to a creditor while there was a party ready to administer who had a prior title," the son and residuary legatee in the present case having, by the practice of the court, a preferable title; for where the same person is both next of kin and residuary legatee, it has been decided that neither law nor practice would warrant a refusal to grant administration with the will annexed to such a person. *Linthwaite v. Galloway*, 2 Lee, 414. And the averment that there is no residuum will not alter the rule. *Thomas v. Butler*, 1 Vent. 217. It has, however, been said that a next of kin seldom seeks for the administration of an insolvent estate for any good purpose. That observation applies, I apprehend, to those cases only in which the next of kin are clearly excluded, and no residue can by possibility be left. I find no semblance of an authority to show the creditor's right, except *West v. Willby*, 3 Phillim. 374; but then the circumstances of that case must be taken into consideration. There the guardian of the next of kin had renounced, and what the court did was to refuse to allow the guardian to retract that renunciation. The case itself, when examined, shows that had she not renounced, the grant would have been made to her. The conclusion to which I arrive is, that F. C., the son and residuary legatee, is to be preferred to F. Rebello, the creditor. As to the argument that F. Rebello is a more fit person than F. C., and that the other creditors are of that opinion, it is true that where parties having an equal interest are before the court, I can decide which may be the fittest; but here, as I have already said, I have no such discretion. Another objection was, that F. C. was *non compos mentis*, had led a dissolute life, and been subject to delirium

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tremens; but it is not proved that he is not now competent. I shall, therefore, decree the administration to F. C., the son and residuary legatee; and, since the averments of incompetency are not proved, I shall condemn F. Rebello in the costs.

CONSISTORY COURT.

THE RECTOR AND CHURCHWARDENS OF ST. JOHN'S, WALDBROOK, v.
THE PARISHIONERS THEREOF IN SPECIAL, AND ALL OTHERS IN
GENERAL.¹

. May 28, 1852.

*London City Improvement Acts, 1840 and 1850 — Burial-ground —
Faculty.*

A faculty for altering the boundaries of a churchyard, and diverting part of the consecrated ground to secular purposes, refused.

THE mayor, aldermen, and commonalty of the city of London, under the 10 & 11 Vict. c. 280, and the 13 & 14 Vict. c. 56, proceeded to make a new street from Cannon-street to St. Paul's churchyard, and other improvements in the neighboring streets. For the purpose of carrying out these improvements, it became necessary to set back and rebuild the wall of the burial-ground of the parish of St. John's, Walbrook, and to remove further within the wall, when rebuilt, a certain tomb in the north-east corner of the burial-ground; and it was also necessary that the remains of any bodies which might be disturbed by removing and rebuilding the wall should be re-interred in some suitable place within the remaining portion of the burial-ground. By an act subsequently obtained by the corporation, 14 & 15 Vict. c. 91, intituled "The City of London Sewers Act, 1851," having for its object to continue "The City of London Sewers Act, 1848," and to alter and amend the same, it is provided in the 32d clause, "that after any churchyard or burial-ground should have ceased to be used for the interment of the dead, it shall be lawful for the commissioners, with the consent of the Bishop of London, to be signified by any instrument in writing under his hand and seal, to enter into such arrangements as may be agreed upon with the incumbent and churchwardens of the parish in which such churchyard or burial-ground may be situated, for the appropriation thereof, or of any part thereof, to public improvements, or to enlarge and improve the public streets." Other clauses follow, giving powers in such a case to remove and re-inter bodies without any faculty for that purpose, and to level and

¹ 16 Jur. 645.

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alter the ground, &c., at the expense, under certain limits, of the commissioners.

Upon this it was suggested, that had the burial-ground of St. John's, Walbrook, been wholly discontinued as a place of sepulture, then, under the act last referred to, the entire ground, or any part of it, might have been appropriated to the enlargement of the adjacent streets, or any other recognized public improvement, without the aid of the court; but as the major part of it was proposed to be still retained as a burial-ground, the smaller portions proposed to be taken away, though not required, nor for at least eighty-five years past used for interments, could not be detached from the main body of the ground, however ample the remaining portion might be for the burials required by the parish, except under the authority of a faculty to be granted by the court for that purpose. It appeared from the affidavit of the vestry clerk, that at a vestry meeting an agreement had been made between the parish and the mayor, &c., of the city of London, for the purposes of effecting these measures, on terms advantageous to the parish; that very few bodies are now annually interred in the burial-ground, and the family to whom the tomb referred to belonged were extinct.

Harding, Q. A., upon these grounds, applied to the court for a decree with intimation to issue, calling upon the parishioners, &c., to show cause why a faculty should not issue for making the proposed alterations. He cited *Steeven and Hollah v. St. Martin Orgars*, 2 Add. 255, in which a faculty was granted to take down a building erected for the performance of divine service, &c., in the French language, upon the site of a church destroyed in the great fire.

Dr. LUSHINGTON. If this case comes within the statute referred to, the 14 & 15 Vict. c. 91, it is clear that the application should be made, not to me, but to the Bishop of London, who may consent in the manner pointed out in the 32d section. But if the case does not come within that statute, and the application is rightly made to me, can I grant a faculty to desecrate this piece of ground? Upon principle I do not think I could grant such a faculty; but the point has been settled by authority, for I distinctly remember an application of this kind being rejected by Sir William Wynne, in the parish of Ewelme, in Surrey, where he observed that nothing save an act of parliament would enable him to apply consecrated ground to secular purposes; and I also remember Sir C. Robinson refusing an application of the same kind respecting consecrated ground in some parish in Colchester. Sir W. Wynne's authority is binding on me; and both here and in Rochester I have constantly refused to grant faculties for these purposes. I must reject this motion, however desirable it may be, and advantageous to the public or to the parish, that these improvements should be effected.

Campbell v. Parishioners of Paddington.

CONSISTORY COURT.

CAMPBELL and others v. THE PARISHIONERS OF PADDINGTON and others.¹

July 8, 1852.

Faculty to build a Vestry-room on Consecrated ground granted.

SINCE 1824 the parochial business of the parish of Paddington has been managed by certain parishioners elected for the purpose, under the provisions of the 5 Geo. 4, c. 126; but as the population and business of the parish increased, it was found that the building originally used for holding the vestry meetings was inconveniently small. At meetings duly held on the 2d March and 4th May, 1852, it was resolved, in accordance with the recommendation of a committee appointed by the vestry, to remove from the present building, to obtain a site for the erection of a new vestry-room and appropriate offices, and that a certain piece of ground purchased by the parish in 1843 was the most eligible site that could be procured. This piece of ground, however, had been consecrated as a burial-ground, but no bodies had been interred, nor was it intended to be used as a burial-ground. The Bishop of London is the patron of the perpetual curacy and parish church of Paddington, and a consenting party. A decree with intimation issued, and was served in the usual manner; and

Middleton now moved the court to decree a license or faculty for erecting suitable buildings for holding vestry and other parochial meetings on this piece of ground.

Dr. LUSHINGTON. If this application were for the purpose of applying the consecrated ground to purely secular purposes, I should, notwithstanding the consent and convenience of all the persons interested, and of the parish, hold myself obliged to reject it; for I should be bound by the case of *St. George, Hanover-square v. Stewart*, 2 Str. 1126, where a prohibition was granted in a case in which it was proposed to erect a charity school on part of the church-yard. But I have considered the present case a good deal, and I think I can find a distinction between a school which is used for purposes merely secular, and a vestry-room, which may be used for religious purposes. I shall therefore grant this faculty; but I do so with no inconsiderable doubt, and it must be taken liable to all the consequences which may follow if there should happen to be proceedings taken in other courts.

¹ 16 Jur. 646.

Salmon v. Salmon. Coombes v. The Queen's Proctor.

CONSISTORY COURT

SALMON v. SALMON.¹

July 8, 1852.

Divorce Cause — Expedition in obtaining Sentence.

THIS was a cause of separation promoted by the husband against the wife. The facts are immaterial. In pronouncing for the separation,

Dr. LUSHINGTON said — I must express my satisfaction at the expedition with which this cause has been conducted. It shows, when persons are really in earnest, and determined to get to the end of the proceedings, how quickly that may be done. This cause commenced on the 9th June, and I am now deciding it on the 8th July, witnesses having been examined not only in England, but in Paris.

PREROGATIVE COURT.

COOMBES v. THE QUEEN'S PROCTOR.²

March 16 and July 6, 1852.

Property of intestate Wife of Convict.

M. C. died intestate, the wife of a felon under sentence of transportation, and leaving property acquired after the conviction of her husband : —

Held, that such property belonged to the crown as accrued to the felon, and not to the next of kin of the wife.

THE facts of this case, which were set forth in act on petition, are given in the judgment.

Deane, for the father and next of kin of the wife. The definition of civil death is to be found in *Bullock v. Dodds*, 2 B. & Al. 275, where it is said of one *civiliter mortuus*, that he may acquire, but he cannot retain; he may acquire, not by reason of any capacity in himself, but because, if a gift be made to him, the donor cannot make his own act void, and reclaim his own gift; and as the donor cannot do this, and the attainted donee cannot enjoy, the thing given vests in the crown by its prerogative, there being no other person in whom it can vest. This is so where the attainted person takes by way of gift as a legacy. *Church's Trust*, 16 Jur. 517, s. c. 11 Eng. Rep. 240, or as

¹ 16 Jur. 646.

² 16 Jur. 820.

persona designata by statute; for instance, under the Statute of Distributions. *Roberts v. Walker*, 1 Russ. & M. 754. But neither the words nor the principle of *Bullock v. Dodds* will apply to the present case, where the property, if it pass to the felon at all, must pass *jure mariti*. But transportation for felony operates as a suspension of marital rights during the period of sentence. *Ex parte Franks*, 1 Moo. & Sc. 11. *Weyland's case*, Co. Litt. 133, a., is an authority showing the effect of civil death on marital rights; and so, *Newsome v. Bowyer*, 3 P. Wms. 37. To the same effect was *Hyde v. Price*, 3 Ves. 443, by Lord Alvanley; *Lean v. Schutz*, 2 Bl. Com. 1175; and *Hatches v. Baddeley*, Id. 1082, where Sir W. Blackstone says that in the cases of abjuration, exile, and the like, the husband is considered as dead, and the woman as a widow, or else divorced *a vinculo* — a dictum referred to and approved by Lord Tenterden in *Lewis v. Lee*, 3 B. & Cr. 297, which is the more to the purpose, Lord Tenterden being the judge who defined civil death in *Bullock v. Dodds*. That the husband's rights are suspended by conviction is also borne out by the recent case of *In the Goods of Martin*, 15 Jur. 686, s. c. 5 Eng. Rep. 586, where the will of the wife of a felon was pronounced for.

J. D. Harding, Q. A. *Bullock v. Dodds* and *Roberts v. Walker*, already cited, are decisive on the point. The husband convict acquires, but cannot retain, and his right falls to the crown. The argument on the other side fails from a confusion between abjuration and felony. *Ex vi termini*, by conviction for felony the property in the possession of or accruing to the felon is forfeited, and belongs to the crown. This is distinctly stated as the result of the cases in the last edition of Wms. Exors. 1219.

Deane, in reply. Abjuration, as well as attainder for treason or felony, is a civil death; (Co. Litt. 133, a.) and though Lord Coke says that relegation, or being exiled for a time by act of parliament, is no civil death, Mr. Hargraves, in his note on the passage, observes, the effect is the same to the wife. The distinction taken between this case, which relates to marital rights, and *Roberts v. Walker* and *Church's Trust*, has not been touched by the argument for the crown. The passage cited from Wms. Exors. is confined to the case of a felon legatee, by the learned author himself, in the marginal note; his authorities are the cases cited.

DODSON, J. In this case of *Coombes v. The Queen's Proctor*, the question is as to the right to the personal estate of Mary Coombes, deceased. She died on the 6th September, 1850, leaving personal property, consisting of about 200*l.* in a savings bank, the produce of her own industry. She died intestate, and without a child; her husband, Robert Coombes, survived her, but it appears that upon the 30th January, 1837, he was convicted of two separate felonies, and he was sentenced to seven years transportation for each offence, that is, until the 30th January, 1851, and consequently till after the

death of Mary Coombes, the deceased in this case; hence he was a felon convict at the time of her death. It appears that he had a conditional pardon in the year 1848, not from the crown, but, under an act of parliament, from the governor of the colony, that colony being Van Diemen's Land, whereupon he went to Victoria. But, as it will presently be seen, this makes no real difference in the question which the court has to decide: that conditional pardon has no effect whatever so as to reach to certain cases which must be mentioned. Now, the period for which the husband was sentenced has since elapsed, but he is no party to the present proceedings. Indeed, some doubt has been suggested on one side whether he is still living or not; however, there is no doubt he was alive at the time of the wife's death. The parties before the court at present are, first, the Queen's proctor, asserting the right of her Majesty to the property; and, secondly, the father of Mrs. Coombes, insisting upon his right to the personal estate left by his daughter, being, as I stated before, the sum of 200*l.* in a savings bank. A claim is asserted on the part of the crown, not merely to the effects belonging to a felon at the time of his conviction, but also to any which may accrue to him afterwards during the time that he remains a felon convict; and consequently it has been argued that her Majesty has a right to the personal estate of Mrs. Coombes, to which her husband would have been solely entitled, but for his conviction as a felon.

On the other hand, it is contended on the part of the father of Mrs. Coombes, that whatever effect the conviction of the husband might have upon the property possessed by him at the date of his conviction, it can have no effect whatever on the property since gained by the wife, when she continued in this country acting as a feme sole; that she is to be regarded as a widow, or as a wife divorced a *vinculo matrimonii*, and that her property would go to her next of kin, that is, in this case, to himself, as her natural and lawful father, she having no children. Now, in support of the right of the crown, certain cases have been referred to, and amongst them *Bullock v. Dodds*, 2 B. & Al. 258. It appears by the marginal note there were two points in that case, and as to the second point it says, "By attainder, all the personal property and rights of action in respect of property accruing to the party attainted, either before or after attainder, are vested in the crown without office found; and therefore attainder may be well pleaded in bar to an action on a bill of exchange indorsed to the plaintiff after his attainder." Therefore, where a party had been a felon convict, or where he had been attainted, it was held in *Bullock v. Dodds* that the crown was entitled, not only to the property which the convict had at the time of his conviction, but every thing that accrued to him afterwards was for the use of the crown, and not for the benefit of the convict himself. In p. 275 of that case, Abbott, C. J., in delivering judgment upon it, is reported to have said, "Upon consideration we are of opinion that the attainder of the plaintiff was perfectly pleadable in bar. An attainted person is considered in law as one *civiliter mortuus*. He may acquire, but he cannot retain; he may acquire, not by reason of any capacity in himself, but because,

if a gift be made to him, the donor cannot make his own act void, and reclaim his own gift; and as the donor cannot do this, and the attainted donee cannot enjoy, the thing given vests in the crown by its prerogative, there being no other person in whom it can vest." So that this is exceedingly clear; it renders the convict *civiliter mortuus*, and his property does not go to the next of kin; not only what actually belongs to himself, but any thing he may acquire afterwards is acquired for the crown, and it will go to the crown. That case, therefore, seems very clear and decisive on the point.

There was a case cited by Dr. Deane on the other side, which he has had the kindness to lend me, and which seems to me to lead very much to the same conclusion; that is, *Church's case*, 16 Jur. 517; s. c. 11 Eng. Rep. 240. It was a decision in Vice-Chancellor Parker's court, and in that case the marginal note is, "Property of felon — vesting of in crown, notwithstanding conditional free pardon in the penal colony." Therefore that brings it very near the present case. "A convict sentenced to death for felony, which sentence was commuted to transportation for life, received a conditional free pardon in the penal colony: — Held, that such pardon does not alter the effect of the attainder in vesting his property in the crown." Therefore the question seems to have been precisely similar to the present, with this one exception, that there the felon had been capitally convicted in the first instance, and afterwards his punishment was reduced to transportation; but he was a felon convict. That is the only difference in the two cases; for here we have a conditional pardon by the governor of the colony. Now, the case is stated thus — "T. Church, by his will, dated in 1821, gave all his real and personal property to trustees, upon trust to sell, and to stand possessed of the proceeds upon trust to invest the same, and, subject to certain annuities, to pay the dividends and income of such investment to his wife for life; and, subject thereto, the testator gave half of the trust fund to the children of his brother, W. Church, who should live to attain twenty-one, as tenants in common. In 1840 the testator died. All his real and personal property was subsequently converted, and their respective shares were paid to the children of W. Church, except to one, who, having attained twenty-one, had been tried for felony in 1833, and sentenced to death, which sentence was commuted to transportation for life, a punishment he was then undergoing. A conditional free pardon, however, had been granted to him in the penal colony. The trustees paid his share into court under the Trustee Relief Act, and the present petition was presented by her Majesty's attorney-general, praying that the costs thereof might be taxed, and paid out of the fund in court, and that the residue of such fund might be paid to such person or persons as her Majesty by sign-manual should appoint to receive the same." Then the decision is this — "Notwithstanding the conditional free pardon, his Honor, considering that the convict was still under attainder, made the order as prayed." So, because he was still under attainder, still a felon convict, though he had received this conditional pardon from the governor of the colony, his Honor held that the property belonged to the crown, and directed

it to be paid to any one that appeared for the crown to receive it. It appears to me that it is a case of all-fours with this, and in conformity with *Bullock v. Dodds*. It makes it, I think, quite clear so far, unless something is shown to the contrary, that the property does belong to the crown, and nobody else.

It is true, that in *Church's case* the man had been capitally convicted; that seems the only difference; but he was a felon convict. It is not the punishment of death that makes the attainder, but being a convicted felon. The learned Spelman says that the very term "felony" necessarily implies forfeiture of estate; and this derivation and meaning of Spelman is adopted by Blackstone. That seems to me to be the meaning, and though other learned lexicographers give a different derivation, yet they all come to the same conclusion, that a conviction for felony, whether accompanied by a capital punishment, whether it be by suspending by the neck, or transportation, or burning in the hand, or whatever it be, a conviction for felony implies forfeiture of estate, and of goods and chattels. It is quite clear, on the authority of the cases mentioned, unless there be something to repel it on the other side, that the property of a felon convict becomes the property of the crown, and not only such as he had at the time of conviction, but any thing that may accrue to him during the period the conviction remains in force, till he receives an absolute pardon from the crown, or the punishment has been endured.

Now, a variety of cases have been cited on the other side to show that Mrs. Coombes was to be considered as a feme sole, as a widow, or as a person who has been divorced a *vinculo matrimonii*, and therefore there was no doubt that her father would be entitled to the property. The cases which have been referred to do not go at all as to the distribution of property on the death of a person so circumstanced as the wife of a convicted felon, but they go as to points of trading, whether she could trade as a feme sole, whether she was liable to the bankrupt laws, and questions of that description. Certainly there are expressions from which it appears that the wives of persons who are exiled, persons who are banished, persons who had abjured the realm, and the like, are to be considered in the light which the learned counsel pointed out; but there is nothing to show that on the death of a party so carrying on trade the property is to go to the next of kin.

Now, the first case, I think, in point of date, so referred to, was one in Sir William Blackstone's Reports. I believe there was a case referred to in Co. Litt. — the case of *Weyland*, or some such case; that was a case of abjuring the realm, not of a convict. Now, the case reported in 2 W. Bl. 1079, is entitled *Hachett and others v. Baddeley*. The sole point in that case is, whether a woman who had eloped from her husband, and run into debt, can be sued for it. The marginal note is, "Feme covert eloping from her husband, and running into debt, cannot be sued alone." So that, in point of fact, that authority would go the other way. There is another case in the same volume, mentioned by D. Deane; that is the case of *Lean v. Schutz*. That is with respect to a feme covert having a separate

maintenance, though she had a separate maintenance, and was **living** separate and apart from her husband, still she could not be **sued** without her husband. But what was referred to was at the **end** of the case. "The general question was intended by the parties to be decided, but it is not necessary to decide it upon this record, for the whole is totally vicious, as the husband is no party to the record. There is no instance in the books of an action being sustained against the wife, the husband being living at the time, and under no civil imbecility. Even by the custom of London, though the wife and her effects are alone liable to execution, if she be a sole trader, yet the husband must be a co-defendant; and though a wife may acquire a separate character by the civil death of her husband, as by exile, profession, or abjuration, yet by a voluntary separation she does not acquire such a character, which may be called a civil widowhood." Then it was contended by the learned counsel that by abjuration, by exile, or by profession, she did obtain this separate character, and from thence he would infer that her next of kin would be entitled to her property after her death. There is nothing said here about a felon convict. There is profession, exile, abjuration, in none of which is there a forfeiture of goods; it is in felony alone that the goods are forfeited. In abjuration, where it is made voluntarily, where the parties abjure the realm out of disgust, as it is said, or where a man abjures it instead of remaining to be punished, and where he makes himself an exile, there is no forfeiture of goods; he departs the kingdom, and then, in that case, the wife may sue or be sued without the husband being joined with her. Now, that does not seem to touch the question — at least not materially.

Another case was referred to in *Peere Williams* — that of *Newsome v. Bowyer*. That, again, was a case where a party had voluntarily transported himself; he had been convicted, but he had received an absolute pardon from the crown, not the governor of the colony, which is entitled a conditional pardon, and which the governor is allowed to grant under a special act of parliament. But in this case the party had been convicted of felony; he had received a pardon, but he had transported himself. His wife remained here, and some property devolved upon her. A share of the orphanage fund, under the custom of the city of London, came to the wife, and there was great difficulty in knowing what to do with it. It was invested, and the wife was allowed to have the interest for her sustenance and maintenance. The husband, who had transported himself, afterwards died; the wife married again, and, upon an application to the Court of Chancery, the money was transferred to the second husband. The chancellor much doubted the propriety of doing it; but, however that may be, that does not touch the present case, because the person, though he had been a felon convict, had received an absolute pardon from the crown, and he was not transported as the consequence of his conviction of felony, as a part of his punishment, but he transported himself, was voluntarily absent. In that case it was allowed that the wife, to whom the property passed under the orphanage law of the city of London, should

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have the interest; and afterwards, when her husband was dead, and she married again, the second husband took the property.

Another case referred to was that of *Roberts v. Walker*, 1 Russ. & M. 754. The marginal note is to this effect — "Personal property, not belonging to a felon convicted of simple larceny, and sentenced to transportation at the time of his conviction, but accruing due to him afterwards, before his term of transportation has expired, is forfeited to the crown." So that it goes strongly to support the view taken of the case by the Queen's advocate. Now, the master of the rolls, in deciding this case, said, "In this case two questions are made: first, whether the personal property, not belonging to a felon sentenced to transportation at the time of his conviction, but which accrued to him afterwards during the term of his transportation, is forfeited to the crown." That is the first question; then he proceeds to state the second; as to the first he says, "The first point appears to be settled by the case of *Bullock v. Dodds*, and a felon, until the term of his transportation has expired, is not restored to his civil rights." So that seems to be pretty conclusive upon the point.

Other cases were cited by Dr. Deane, and particularly *Ex parte Franks*, 1 Moo. & Sc. 11. In that case the only point was this, whether the wife could carry on business as a feme sole, and be liable to the bankrupt laws, her husband having been convicted of felony, and sent to the hulks, where he was constantly visited by his wife; she had access to him, and so forth. But it was held, notwithstanding, that she was to be considered as a feme sole for the purpose of carrying on the business. The matter was referred to the Court of Common Pleas, and the judges certified to this effect — "We have heard the case argued by counsel a considerable time, and are of opinion that at the date and suing forth of the commission of bankruptcy against Kezia Franks, to wit, on the 25th day of July, 1827, the said Kezia Franks was a trader, and as such liable to become bankrupt, within the true intent and meaning of the act of parliament passed in the sixth year of the reign of his late Majesty King George IV." Then the certificate is signed by the judges, and there are the arguments of counsel, in which they go through the various cases I have already referred to, and mention some others; but this is the conclusion to which the learned judges arrive, and this is the certificate which they give.

Then I think these cases, especially those of *Bullock v. Dodds* and *Roberts v. Walker*, are clearly and directly to the point; and the other cases respecting separate trading, and the wife being considered a feme sole, whether her husband is an exile, or has banished himself, or abjured the realm, cannot affect the law touching the goods of a felon convict; consequently this property must be held to be the property of the crown. And this seems to be the view taken of it by Williams, J., in his last edition of the Law of Executors, for at p. 1219 he states it thus: "Where a man is convicted of felony, and sentenced to transportation, not only the personal property which belonged to him at the time of conviction, but also that which accrues due to him afterwards, during the term of transportation, such as a legacy bequeathed

• *In re Mary Brown.*

to him, or a share of a residue devolving on him during that period, is forfeited to the crown." Well, that is precisely the case that has happened in the present instance; it seems to apply to it most directly. On the death of Mrs. Coombes, this property devolved to her husband; that is, would have devolved to him but for being a felon convict: it devolved to him; he acquired, but he cannot take it for himself — he acquires it for the crown. This being the result of the cases — this being the opinion expressed by the learned judge in the work to which I have already referred, I can have no hesitation in deciding that the property in question, the sum of 200*l.*, belongs to the crown, and not to James Coombes, the father of the deceased. The crown being the party on one side, I say nothing at all as to costs.

PREROGATIVE COURT.

In the Goods of MARY BROWN.¹

July 6, 1852.

Wills Act Amendment Act, 1852 — 15 & 16 Vict. c. 24, s. 2.

THIS deceased left a will in her own handwriting, dated in May, 1850, and written on six pages of letter paper, concluding nearly at the sixth page where, as well as at the bottom of each preceding page, she had written her name; but there not being room on the sixth page for an attestation clause, that clause was written on the top of the seventh page, and the testatrix again wrote her name there. It appeared from the affidavits in the case that the signature on the sixth side was made before the execution, but the signature on the seventh side was the only one made in the presence of, or seen by, the attesting and subscribing witnesses. Motion for probate of this paper was made and rejected on the 4th December, 1851.

Spinks now renewed the motion, submitting that the will came within the 15 & 16 Vict. c. 24, s. 2, inasmuch as no administration had been taken out to the deceased's estate; and that section extended to all wills where administration had not been already granted by a court of competent jurisdiction, in consequence of the defective execution of such will; and the mere rejection of a motion for probate did not amount to a decree against the paper, which might be propounded and pronounced for afterwards.

DODSON, J. The original motion in this case might, I think, have been granted. However, the will, in the circumstances stated by

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counsel, certainly comes within the act introduced by Lord St. Leonard's, and I shall decree probate of the paper.¹

PREROGATIVE COURT.

HIGGINS v. HIGGINS.²

December 8, 1852.

Practice — Production of all the attesting Witnesses.

The party propounding a will is bound to produce all, however numerous, the attesting witnesses, if he asks for publication before the expiration of the term probatory.

THE deceased left a will, to which there were four subscribing witnesses. On the conditit propounding this will, three of these witnesses were produced and examined. The term probatory had not expired.

Jenner now moved the court to decree publication, without waiting for the expiration of the term probatory. The proctor for the party opposing the will neither consented nor objected; but the rule was, that you were not bound to produce the witness, unless called on to do so for the purpose of his cross-examination. *Cartwright v. Cartwright*, 1 Phillim. 94. In *Croft v. Day*, 1 Curt. 846, a subscribing witness, not examined in chief, was directed to be produced for cross-examination; and so he might be here, if the other side thought it requisite, which, from their not objecting to publication, it may be inferred they do not. So, where the witness could not be found, publication was decreed, leaving it to those opposing the will to apply for a monition against him. *Wynn v. Robinson*, 1 Hagg. 68.

DODSON, J. If you had prayed publication simply, I should have decreed it; but as you state that the proctor on the other side neither

¹ This is the first case brought before the court under "The Wills Act Amendment Act, 1852," and will probably be followed by many in which the circumstances will be similar. In an edition of this act lately published by Messrs. Wildy, there is in the note to sect. 2 an expression which is ambiguous, and may mislead persons not acquainted with the course of practice in the Courts of Probate. In the note referred to it is said, that the act "extends to every will which has not been already proved or rejected." This expression "rejected" is properly applicable, not to the will, but to the motion for probate of the will; and the mere rejection of this motion will not defeat the will, which may still be propounded, as observed by the counsel in this case of *Mary Brown*. And, in point of fact, the court, in a doubtful case, will frequently reject a motion with the express intention of having the paper propounded and the law discussed, and giving the parties an opportunity of appealing. This was the course suggested in the much agitated case of *The Goods of Shadwell*, 2 Robert. 140. The note would, therefore, be more correctly expressed if it said, that "the act shall extend to all wills which have not been already pronounced to be defectively executed," instead of "rejected."

² 16 Jur. 1122.

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consents nor objects, I shall not take upon myself the responsibility of allowing a departure from the usual practice here, and elsewhere, that you should produce all the subscribing witnesses — a sound practice, for the validity of many wills has been determined upon the evidence of the minority of witnesses. I shall not decree publication; and if you choose, when the term probatory has expired and publication regularly passed, to go to a hearing without having produced this witness, you must run the risk of any objection which may then be taken.

COURT OF ARCHES.

WILLIAMS v. WILLIAMS.¹

July 1, 1852.

Appeal — Practice of Court below — Vivâ voce Evidence.

Where it is the practice of the court below to admit *vivâ voce* evidence, the court of appeal will proceed upon that evidence as contained in the judge's notes, and not direct the proceedings to commence *de novo*.

This was an appeal in a testamentary cause from the Consistorial Court of St. David's, where both parties had pleaded, and examined and cross-examined witnesses. On the process being transmitted, it appeared that the evidence had, as was the practice in that court, been given *vivâ voce*, and was contained in the judge's notes. On the case being opened,

Addams and *Haggard*, for the appellant, objected to the reception of the evidence so taken, and contended, that the proceedings having been in that respect irregular, the cause should commence *de novo*; and they cited *Jones v. Yarnold*, 2 Lee, 568.

Bayford and *Deane*, for the respondent. The practice of the court is to take the evidence in this manner; it was so in *Williams v. George*, 3 Curt. 343; but both sides have committed the irregularity, if it be one; and an irregularity is cured by acquiescence or consent. *Parkes v. Parkes*, not yet reported.

Sir J. Dodson having expressed his opinion that the objection could not be sustained against the practice of the court and consent of both parties, the appeal on the merits was abandoned, and the sentence affirmed.

In re Hinds.

PREROGATIVE COURT.

In the Goods of WILLIAM HINDS.¹

December 8, 1852.

1 *Vict. c. 26, s. 9* — *Subscription in Margin against Alteration, by initials of subscribing Witnesses.*

In 1847, A regularly executed his will; two years afterwards he made an interlineation in the will, in the margin of which and opposite the interlineation, he and the subscribing witnesses to the will placed their initials:—

Held, that the interlineation was to form part of the probate.

THE deceased executed his will in October, 1847, when certain alterations were noticed. In 1849 he sent for the same persons who had attested and subscribed the will at its execution, and pointed out to them an interlineation of four lines, and he then in their joint presence placed his initials in the margin opposite the interlineation, and they thereupon, and in his presence, placed their initials below his. At his death the interlineation was obliterated, and other alterations appeared in the will.

Curteis moved the court to decree probate of the will, with the alterations proved to have been made before the first execution, and with the interlineation. In support of this part of his motion he cited *The Goods of Amiss*, 2 Robert. 116, in which the word "signature" in the act had been held to be satisfied by a mark or initials; *The Goods of Wingrove*, 13 Jur. 71, in which an alteration was held to be well made where the names of the testator and witnesses were in the margin; and *The Goods of Christian*, 2 Robert. 110, where the will was signed by the witnesses with their names, but a codicil executed immediately afterwards to supply an omission in the will was subscribed by the same witnesses with their initials only, and probate of it decreed.

Sir J. Dodson, upon the authority of *The Goods of Christian*, decreed probate of the will, with the interlineation, and also with the alterations made before the first execution, but without the erasure of the interlineation and the other alterations.

¹ 16 Jur. 1161.

In re Wilmot.

PREROGATIVE COURT.

In the Goods of E. WILMOT.¹

November 3, 1852.

Practice — Grant of Probate to substituted Executor.

E. W. appointed C. F. W. executor of her will, and in case he should be abroad, or otherwise incapable of acting, at the time of her decease, then E. N. W. to act only during such time as C. F. W. shall be resident abroad, or incapable of acting from any other cause. C. F. W. died in the lifetime of testatrix. Probate granted to E. N. W. as substituted Executor.

ELIZABETH WILMOT, by her will, dated the 22d May, 1844, after giving various legacies, bequeathed the residue of her property to her nephew, Charles Foley Wilmot, and then declared as follows: — “I nominate, constitute, and appoint my said nephew, Charles Foley Wilmot executor of this my will; but in case the said Charles Foley Wilmot shall happen, at the time of my decease, to be abroad, or, from any other cause, incapable of acting as such executor, then and in such case I appoint my said nephew, Eardley Nicholas Wilmot executor, to act only during such time as the said Charles Foley Wilmot shall be resident abroad, or otherwise incapable of acting as aforesaid.” Charles Foley Wilmot died on the 23d March, 1852, in the lifetime of the testatrix. The testatrix died in the month of September, 1852.

Pratt moved the court to decree probate to Eardley Nicholas Wilmot as substituted executor. If Charles Foley Wilmot had died abroad after the death of the testatrix, and probate had been granted, as it might regularly have been in that case, to Eardley Nicholas Wilmot, such probate would not have been called in on the death of Charles, but Eardley would have continued to act; then why should he not, looking at the intention of the testatrix, and the words in which the intention is expressed, take the grant now? The case was within Swinb. Wills. p. 4, s. 19 — “Wheresoever it is likely that the testator would have substituted in the case not expressed, if he had remembered the same, as well as in the case expressed, there the substitute is to be admitted as if the same case had been expressed.”

Sir J. DODSON. Eardley Nicholas Wilmot is to act only during such time as Charles shall be resident abroad, or otherwise incapable of acting as aforesaid — that is, from any other cause. Those last words are very large; and though I have some hesitation in coming to that decision, I think I may grant the motion.

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COURT OF ARCHES.

The Office of the Judge promoted by THE BISHOP OF HEREFORD
v. THOMPSON.¹

December 4, 1852, and January 19, 1853.

3 & 4 Vict. c. 86, (*Church Discipline Act*) — *Limitation of Time for instituting Proceedings.*

To a citation against a clerk in holy orders, under the Church Discipline Act, the clerk appeared under protest, on several grounds : first, that the 3d section limited the number of parties complaining to one ; secondly, that the charges were laid between March, 1850, and June, 1851, the letters of request were not sent to the Court of Appeal till after the 22d May, 1852 ; thirdly, that the bishop of the diocese could not substitute himself for the original promoters ; fourthly, that the offences being charged between March, 1850, and June, 1851, and the decree being dated September, 1852, the offences may have been committed more than two years before the institution of the suit in the Court of Arches, the proceedings there being viewed as original proceedings : —

Held, that the first, second, and third objections failed, but that the fourth was a good objection ; and the clerk was dismissed.

THIS was a proceeding under the Church Discipline Act against a clergyman. The first inquiry took place before commissioners in the diocese, who having reported that there were *primâ facie* grounds for instituting proceedings, the case was sent by letters of request to the Court of Appeal of the province. A citation accordingly issued from that court, to which an appearance was given on behalf of the clerk cited, but under protest, on the several grounds which are referred to in the judgment.

Addams and *Curteis*, in support of the protest.

Bayford and *Twiss*, contra.

Sir J. DODSON. In this case, in consequence of letters of request from the Bishop of Hereford, a decree issued from the registry of this court, citing the Rev. E. Thompson to appear. The decree is dated on the 20th September, 1852 ; it was served on the 1st October in the same year, and returned on the 2d November. The decree begins by reciting the letters of request, to the effect that application had been made to the bishop by certain persons therein named, one of whom is stated to be church-warden of Kington, complaining and charging that the Rev. E. Thompson, D. D., vicar of Kington, had within two years then last past been guilty of conduct and demeanor unbecoming a clergyman, by having within two years last, to wit, between March, 1850, and June, 1851, harbored and kept in the vicarage-house (taking it to be in the diocese of Hereford,) one H. S. A. M. B., being a notoriously lewd and unchaste woman ; and also by

¹ 17 Jur. 190.

having at divers times within the said period, in the said vicarage house, and in divers other places within the said diocese, been guilty of adultery, lewdness, incontinence, and indecency with her; and by having within the same period improperly, and contrary to the canons, admitted her to the holy communion; and praying that the bishop would issue, or cause to be issued, in pursuance of the act 3 & 4 Vict. c. 86, a commission for the purpose of making inquiry as to the grounds of the said charges: and further reciting that the Bishop of Hereford, being at the time patron of the vicarage, upon the 13th December, 1851, did, pursuant to the act, refer the application to the Lord Archbishop of Canterbury; that the archbishop did, on the 1st January, 1852, issue a notice under his hand to Dr. Thompson, of his intention to issue a commission, pursuant to the act, which notice contained an intimation of the nature of the offences, together with the names, additions, and residences of the complainants, which notice was served on Dr. Thompson on the 3d January, 1852; that on the 20th January, 1852, the archbishop issued a commission: that one of the commissioners issued a notice of the time and place when and where the commissioners would meet, and this notice was duly served on the 13th March, 1852: that the commissioners did accordingly meet at Hereford on Tuesday, the 13th April, 1852, and on the four following days, and also on Monday, the 19th April, and examined witnesses on oath in support of the charges, and also for the defence, Dr. Thompson and his agent being present: that upon the said 19th April one of the commissioners openly declared that they were unanimously of opinion that there were sufficient *prima facie* grounds for instituting further proceedings against Dr. Thompson: that the bishop has since the 15th May ceased to be patron of the living, and that by reason thereof the archbishop, on the 20th May, transmitted to the bishop the report and proceedings, and that they were deposited in the registry of the bishop, pursuant to the act: and further reciting that the bishop had thought fit to institute further proceedings thereon, and to send the case, by letters of request, to the Court of Appeal of the province — that is, to this court. The decree, after these recitals, calls on Dr. Thompson to make his appearance, and to answer to certain articles in the usual way, for having offended against the laws ecclesiastical.

Then comes the *præsertim* — a specification of what he was to appear for, and more especially for having, some time between the months of March, 1850, and June, 1851, harbored and kept in the vicarage-house of Kington aforesaid the said B., describing her by her christain name as before, a notoriously lewd and unchaste woman, and for having within the period aforesaid been guilty of indecencies, and committed adultery with her, and for having administered to her the holy communion. This was the decree that was served on Dr. Thompson, and to this decree, thus served upon him, he has given an appearance, but an appearance under protest, denying the jurisdiction of the court. And with respect to the time at which this objection is taken, denying the jurisdiction of the court, I am clearly of opinion that he has taken it at the right time. Supposing the court has no

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jurisdiction to entertain the question, it is advantageous to both parties that the objection should be taken at as early an occasion as possible. I am, therefore, of opinion, that in that respect Dr. Thompson is perfectly correct. He was bound to appear; he has appeared under protest, and prayed to be dismissed.

The appearance having been so given for him, he was assigned to extend this protest according to the usual and ordinary practice; and this has accordingly been done by him, but in a very brief manner indeed; because the way in which the protest has been extended on behalf of Dr. Thompson really gives the court no more information than might have been given verbally, since it merely recites the 23d section of the Church Discipline Act, by which it is enacted, that no clerk in holy orders shall be proceeded against criminally otherwise than is provided for by that act; and further, that it plainly appears upon the face of the decree, that the suit has not been sent here according to the true intent and meaning of that statute. He does not condescend to particularize, or to set forth in what respect the course which has been pursued by the bishop differs from the mode prescribed by the statute; he contents himself with this general averment. That Dr. Thompson is correct in his position of law, that no clerk in holy orders can be proceeded against criminally in an ecclesiastical court otherwise than is provided by the Church Discipline Act, there can be no doubt. But the question which the court has to decide is, whether the tenor of the statute has not been complied with in this case. Various objections have been raised by counsel, and it is upon the validity of the objections so taken — not set forth in the act on petition, except in the general way — which I have stated that I have to decide.

The first objection taken by counsel was as to the number of persons who made the complaint to the bishop, and upon whose complaint the inquiry before the commissioners was founded. It was said there were thirteen or fourteen — and there might as well have been 1300 or 1400 — that one alone was sufficient, and one alone was proper. The 3d section of the statute says, that “it shall be lawful for the bishop, upon any party complaining, to issue a commission;” so that this, as it was stated by counsel, is in the singular number; but there is nothing to show that he may not do it on the complaint of more persons than one, nor can I see that any disadvantage is sustained by the party proceeded against in consequence of there being more than one. The bishop has a right, it is quite clear from another section of the act, to act not only on the information of a party, but of his own mere motion. I am, therefore, of opinion that this objection does not give any just foundation for dismissing Dr. Thompson from the present suit.

The next objection was as to the delay that occurred in the earlier part of the proceedings in this case. Now, the offences are charged to have been committed between the months of March, 1850, and June, 1851, and thence the counsel infer, and perhaps properly, that the complaint was made to the bishop by these parties as early as the month of June, 1851, that being the last period mentioned as to any

of the offences having been committed; and then it is said, that the bishop did nothing until the month of December, 1851; and certainly there is some sort of delay here from June, 1851, to December, 1851. Whether the complaint was actually made as early as June, 1851, does not appear, nor the precise day when the complaint was made to the bishop. The next proceeding seems to have gone on with considerable speed, as rapidly as it could well be effected. Some difficulty might have arisen in consequence of the bishop being patron of the living then. He could not, under the terms of the act, issue a commission, and it was necessary that he should make an application to the Archbishop of Canterbury. The archbishop, I think, seems to have proceeded with all due speed. Upon the 1st January — complaint having been made to him in December — the notice was issued of a commission; upon the 3d January that notice was served on Dr. Thompson; and upon the 20th of the same month of January, the commission of inquiry actually issued from the archbishop; therefore every diligence was used in that part of the case. Then, upon the 13th March, the notice was given from the commissioners to Dr. Thompson, and upon the 13th April the meeting took place. They sat for several days, and upon the 19th April they made an unanimous report that there was ground for further proceedings. Upon the 22d May this report was sent to the bishop's registry — the bishop himself having ceased to be patron of the living upon the 15th of the said month of May. The archbishop had then no more to do with it. According to the tenor of the act — the undisputed construction of it in that respect — the report was sent to the registry of the bishop, and then the bishop issued his letters of request to this court, in order that further proceedings might be instituted here. I think the learned counsel who took this objection, and took the objection with regard to the number of parties complaining, admitted, towards the close of his argument, that he did not think either of these could be fatal — he did not seem to depend upon them; and I do not think it is necessary, therefore, that I should make any further observations upon these parts of the case.

Then, again, it was said that the bishop had no right to substitute himself for the complainants or promoters when he issued these letters of request. But the 13th section provides that the bishop may himself send the cause by letters of request. The next serious objection — there were minor objections, not indeed much insisted on — was, that the decree did not specify the places in which some of the offences were, as alleged, committed. But the decree calls upon the party proceeded against to answer more especially for having, some time between the months of March, 1850, and January, 1851, harbored and kept in the parsonage house of Kington the said B., a notoriously lewd and unchaste woman, and for having within the period aforesaid been guilty of indecencies, and committed adultery with her, and for having administered to her the holy communion. It is argued that all these offences might have been committed elsewhere than in the parsonage house, and not necessarily within the diocese of Hereford, and that Dr. Thompson is not called upon to

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defend himself against charges so laid. But the answer is, that the charges at the end of the decree are to be taken with reference to the preceding parts, which specifically set forth all these offences were committed within the parish of Kington; and that the instrument is to be taken together, and not separately, one part from another. Nor can there be a reasonable doubt of what the intention was.

But supposing I could not notice some of the charges because not specifically averred to have taken place in the diocese of Hereford, yet others at least of the charges are so laid, because it is alleged that some of the offences were committed in the vicarage house, and the vicarage house is averred to be within the diocese of Hereford. If, therefore, the objection were well founded in respect to other charges, I could not dismiss the clerk from answering charges laid as committed within the diocese, and the objection would not be fatal to the whole case, but to parts only. *Brecks v. Woolfrey* 1 Curt. 852, is clearly distinguishable. The only question there was, whether the party cited had been guilty of an offence against the laws ecclesiastical, and the court was of opinion that no offence had been committed. The real objection here turns upon the time when the suit was instituted in this court. The decree is dated on the 20th September, 1852, and returned on the 2d November. The offences were charged to have been committed between the months of March, 1850, and June, 1851. They may all, therefore, have been committed more than two years before the suit began or was instituted here. It is not alleged that they continued to June, 1851, but that they were committed between March, 1850, and June, 1851. What, then, are the provisions of the act on the question of time? The 20th section enacts, "that every suit or proceeding shall be commenced within two years after the commission of the offence in respect of which the suit or proceeding shall be instituted." This is a positive enactment, and it is strengthened by the words which follow — "and not afterwards." Taking the section as it stands, it is clear that Dr. Thompson could not be proceeded against for the offences charged against him in this decree, they not having been alleged to have been committed within two years.

But it is said that I must not take this section by itself, but must construe it with reference to other parts, and thus collect the intention of the legislature. I admit the rule to be well founded, and true in some cases; where, for instance, there is any ambiguity in the statute, or it be an old statute, as distinguished from a recent statute. But how, even applying the rule, does it turn out on the present occasion? The 4th section enacts, "that it shall be lawful for the said commissioners, or any three of them, to examine upon oath, and so forth, for the purpose of fully prosecuting the inquiry, and ascertaining whether there be sufficient ground for instituting further proceedings." These further proceedings are mentioned in several other parts of the act; and it is said that the suit in this court is not an original or distinct proceeding, but a mere continuation of the first proceeding — that is, of the commission of inquiry, which was instituted within the two years. I cannot come to this conclusion, though certainly there may

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be some want of clearness as to what is meant in some sections of the act by "proceeding" and "suit." The words are in this section so express, "that every suit or proceeding shall be commenced within two years after the offence committed, and not afterwards," that I consider myself bound to decide upon them as they stand, and I ought not to attempt to do away with them by a reference to expressions which may be found in other sections. This is still more strongly incumbent upon me in a criminal suit like the present, in which the party accused is to have the benefit of a doubt, and the duty of the court is to lean in *mitiorem partem*. But, in truth, I have no doubt. The further proceedings are to be according to the law and practice of this court — that is, they commence by the issue of a decree, which founds a new suit — a fresh proceeding — however it may be in furtherance of other proceedings; and this new suit must commence within two years. I am therefore of opinion that the objection as to time is well founded. I sustain the protest, and dismiss Dr. Thompson from further observance of justice in this case; but I make no order as to costs.

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ACTION.

1. *For Salvage.]* In an action for salvage services, it appeared that the plaintiff, being a common sailor, was ordered by the captain of his own ship to go in a boat with others, for a distance of fourteen miles, to the assistance of another vessel, which was stranded on the bar of a river, and to place himself under the command of the captain of that other vessel:—

Held, that under those circumstances he could not maintain an action against the owner of the vessel saved, for the personal services which he had rendered. *Lipson v. Harrison*, 208.

2. *Notice of.]* Statute 7 & 8 Vict. c. 19, s. 1, after reciting that “courts are holden in and for sundry counties, hundreds, and wapentakes, honors, manors, and other lordships, liberties, and franchises, having by custom or charter jurisdiction for the recovery of debts and damages in personal actions, and in many places great extortion is practised under color of the process of such courts,” enacts, “that the judge of every such court shall have power to appoint bailiffs of the said courts, and that they, and no other persons, should serve summonses, writs, and other processes; provided always, that this act shall not extend to prevent any process from being executed by any high sheriff or high bailiff.” Sect. 9 enacts, (*inter alia*) that in case of actions brought against such bailiffs for any thing done in discharge of their duty as bailiffs, one month’s notice of such action, and of the cause thereof, should be given:—

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1. *Next of Kin.]* The residuary legatee and next of kin of a testator has a right to administration with the will annexed, in opposition to a creditor, though the estate is alleged to be insolvent, and the creditor is supported by the other creditors of the estate. *Crane v. Rebello*, 593.

2. *Appointment of Executor.]* E. W. appointed C. F. W. executor of her will, and in case he should be abroad, or otherwise incapable of acting, at the time of her decease, then E. N. W. to act only during such time as C. F. W. shall be resident abroad, or incapable of acting from any other cause. C. F. W. died in the lifetime of testatrix. Probate granted to E. N. W. as substituted executor. *Wilmot in re*, 609.

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AMENDMENT.

1. *Payment into Court.]* The plaintiff having agreed to act at the defendant's theatre for the season of 1853, which ended in September, at 8*l.* per week, and having been dismissed, brought an action on the 23d of April, for a wrongful dismissal, claiming to receive 32*l.* for four weeks' salary up to that day. The defendant pleaded payment into court of 32*l.*, to which the plaintiff replied, taking that sum out of court, under the mistaken supposition that he would be afterwards entitled to recover for each week's salary as it should become due. Having discovered his mistake, he applied to a judge, who made an order for setting aside the replication, the plaintiff paying the costs, and repaying the money received out of court and costs, the plaintiff to be at liberty to amend the declaration and particulars, and the defendant to plead *de novo* :—

Held, that the judge exercised a proper discretion in making the order. *Emery v. Webster*, 415.

2. *Striking out one Defendant.]* A judge made an order for amending the declaration, by striking out one of the defendants, the other to be at liberty to plead the non-joinder of a co-defendant in abatement, and also *de novo*. The plaintiff had pre-

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viously brought an action against the defendants for some part of the same subject-matter, but failed to prove the joint liability of the defendants; and on an application for a new trial, on the ground of surprise, stated that he could have proved the joint liability of the defendants. On that occasion the court refused, after the trial, to amend by striking out the name of one defendant. The plaintiff, in support of his present application to amend, stated that the evidence to be adduced in the present case, was similar to that relied on on the other trial:—

Held, that the judge was right in ordering the amendment. *Cowburn v. Wearing*, 467.

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APPRENTICE.

1. *Indenture — Validity of.*] Certain rules issued by the Poor Law Commissioners for regulating the binding of parish apprentices, provided, by article 5, that no person above the age of fourteen should be bound without his consent, and no child under sixteen should be bound without the consent of the father, or (if he was dead) of the mother of such child; provided that where such parent should be transported, &c., such consent should be dispensed with. Article 15 provided, that the indenture should be executed in duplicate by the master and guardians, and should not be valid unless signed by the apprentice without assistance, and that the consent of the parent when requisite should be testified by his signing the indenture; and where such consent was dispensed with under article 5, the cause of such dispensation should be stated at the foot of the indenture. They also required that the justices who allowed the binding should certify at the foot of the indenture that they had examined and ascertained that these rules had been complied with. An indenture binding a poor child, purported on its face to be signed by the apprentice “without aid or assistance,” and there was a certificate of a magistrate at the foot, as required by the above rules. There was nothing on the face of the indenture, nor was any evidence adduced, to show whether the indenture had been executed in duplicate, or the apprentice or his parents had consented to the binding, nor was any cause of such consent being dispensed with stated in the indenture:—

Held, that these regulations were merely directory and that the omission to comply with them (if established) would not affect the validity of the indenture; and that the certificate of the magistrate afforded a presumption that the rules had been properly complied with. *Regina v. St. Mary*, 161.

2. *Indentures.*] In covenant against a surety on an indenture of apprenticeship of A. to serve B. and C., the defendant pleaded that there never were or was any service or services for A. to perform to or for the plaintiffs jointly.

To this plea the plaintiffs, setting out the indenture, whereby the defendant covenanted for the service of A. as apprentice to “B., of, &c., surgeon, and C., of, &c., surgeon and apothecary,” replied, that, at the time of the execution of the indenture, the plaintiffs were not in partnership, nor did they carry on business jointly or on the same premises, but that they carried on business wholly separate and apart from and independent of each other, which the defendant, at the time of executing the indenture, well knew, and that the plaintiffs never represented to the defendant that they should carry on business in partnership.

Held, that this replication was bad in substance. *Popham v. Jones*, 359.

3. *Semble*, that the proper course would have been, to take issue on the plea, if the plaintiffs intended to rely on the service of the one as being a constructive service of both masters. *Ib.*

ARBITRATION.

See *AWARD*.

ARREST.

1. *On a Sunday.*] The summary remedy provided for by the 5 & 6 Will. 4, c. 76, s. 60, of committing to gaol town clerks or other officers appointed by a town council, who wilfully refuse to account or deliver up books, &c., to the council, is in the nature

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of civil process, and an arrest under such a warrant of commitment upon a Sunday, is illegal. *Egginton, ex parte*, 146.

2. *Subsequent Detention.*] Nor can a prisoner so arrested be legally detained under a second warrant, subsequently lodged against him, which has been issued at the instance of the same parties, though not in their capacity of town council, but as commissioners under a local act. *Ib.*

3. But a detainer under a *ca. sa.* subsequently issued by a third party, and without collusion, is a valid ground for refusing to discharge the prisoner. *Ib.*

ASSAULT.

1. *What is.*] The defendant ordered the plaintiff to leave his shop, and on his refusal, sent for some men, who mustered round the plaintiff, tucked up their sleeves and aprons, and threatened to break his neck if he did not go out, and would have put him out if he had not gone out: —

Held, an assault upon the plaintiff. *Read v. Coker*, 213.

2. *Notice of Action.*] The 7 & 8 Geo. 4, c. 30, s. 41, (the Malicious Trespass Act) enacts, that in all actions for any thing done in pursuance of the act, notice in writing of such action shall be given to the defendant one month before action brought. The 7 & 8 Geo. 4, c. 29, s. 75, (the Larceny Act,) is to the same effect.

The defendant was sued (in the third count) for having given the plaintiff into custody on a charge of doing wilful damage to the defendant's property, and (in the fourth count) for having given him into custody on a charge of larceny. The jury found that the plaintiff had not, on either occasion, committed the offence with which he was charged, but that the defendant, on both, *bonâ fide* believed that he had: —

Held, as to each count, that the defendant was entitled to notice of action; and that it was not necessary for him to show that he knew of the above acts. *Ib.*

ASSIGNMENT.

Of Reversion.]

See COVENANT.

ASSUMPSIT.

Money had and received.] A sent a horse to B, an auctioneer, to be sold without warranty on certain false representations, the falsehood of which were concealed from B. B sold the horse accordingly, and received the price; but before he paid over the price to A, the purchaser discovered the fraud, rescinded the contract, gave B notice not to pay the price to A, and demanded it back from B: —

Held, a defence to an action by A against B, to recover the price as money had and received to A's use. *Stevens v. Legh*, 210.

For Work and Labor.]

See ACTION.

For money paid.]

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ASSURANCE.

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ATTORNEY.

1. *Privilege of — Client.*] Action by the assignee of the reversion on a covenant in a lease. The deed of assignment of the reversion to the plaintiffs, was subject to certain "mortgage debts." The defendant, in order to prove that the legal estate was out of the plaintiffs, called the attorney of a person to whom the mortgage (subject to which the assignment had been made) had been transferred, to produce the mortgage deed under a *subpœne duces tecum*. The attorney refused to produce it, and said that his client had instructed him not to produce it. Another witness was then called to give secondary evidence of the contents of the deed, by means of a

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- draft; and in order to identify the deed with the draft, the judge ordered the attorney to produce the deed, and to allow the second witness to look at the indorsement; upon which the witness identified it as the deed of which the draft was a copy, and thereupon secondary evidence was received of the contents of the deed:—
Held, first, that the privilege of the client was not violated by requiring the attorney to show the indorsement on the deed. *Phelps v. Prew*, 96.
2. Secondly, by Crompton, J., and *semble*, by Coleridge, J., Wightman, J., and Erie, J., that if the privilege of the client had been violated, the party to the action against whom the evidence was admitted, could not make it a ground of application for a new trial. *Ib.*
 3. *Striking off Roll.*] The mere non-payment of money by an attorney, pursuant to an order and rule of court, is no ground for striking him off the roll. *Guilford v. Seal*, 392.
 4. *Striking off Roll.*] A rule *nisi* to strike an attorney off the roll, after he has been struck off the rolls of the other courts, must be served personally. *Blank, in re*, 399.
 5. *Taxation of.*] The court will not lay down any fixed rule as to the special circumstances under which an attorney's bill may be ordered to be taxed after payment. Stat. 6 & 7 Vict. c. 73, s. 41, should be construed liberally. *Dearden, in re*, 488.
 6. *Rescinding Order.*] Where A paid an attorney's bill in order to get possession of papers withheld from him until payment, and the payment was made without prejudice to the right of taxation, the amount of the bill not appearing, the court would not rescind an order to tax made by a judge at chambers. *Ib.*
 7. *Action for Fees.*] See CONTRACT. NEGLIGENCE. WARRANT OF ATTORNEY.

AUCTIONEER.

See NEGLIGENCE.

Liable to Employer for Negligence.] See ASSUMPSIT.

AWARD.

1. *Construction of.*] An action of ejectment (before the passing of the Common Law Procedure Act) upon the demise of A and the joint demise of B and C, was referred by a judge's order, after issue joined, to the award, final end, and determination of S., the costs of the cause and reference to abide the event. The arbitrator, after reciting the order of reference, awarded as follows: "I award and determine that the verdict in the said cause be entered for the lessors of the plaintiff":—
Held, per Maule, J., and Talfourd, J., (*dissentiente* Williams, J.,) in an action by the lessors of the plaintiff, against the defendant, to recover the costs, that the arbitrator having used words which had no technical meaning, must be understood to have finally determined the cause in favor of the lessors of the plaintiff. *Law v. Blackburn*, 312.
2. *Payment to Stranger.*] An award directing payment of a sum of money to a stranger, is not good, unless it appears on the face of the award that such payment is for the benefit of a party to the submission. *Laing & Todd, in re*, 349.
3. *Order of Payment of Money.*] The court will not make an order under the 1 & 2 Vict. c. 110, payment of money directed to be paid by an award, except in a case where an attachment would have been granted. *Ib.*
4. A dispute between A and B, two shipowners, as to a collision, was, by agreement, referred; the agreement providing that "all such disputes and differences, claims, demands, and damages in respect thereof, should be referred to the arbitrators;" and that "all the costs and charges in and about the submission, the reference, and award, should be in the discretion of the arbitrators." The arbitrators ordered "that all disputes between the parties touching the matters in difference, should cease and determine;" and they further ordered that A should pay, "for the damages and costs incurred by B in consequence of the collision, 72*l.* 6*s.*;" and they further ordered that "the arbitrators' charges and expenses attending the reference, amounting to 62*l.* 14*s.* 10*d.*, should be borne in equal proportions by A and B; and that the said

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sums of 72*l.* 6*s.* and 62*l.* 14*s.* 10*d.*, making together 135*l.* 0*s.* 10*d.*, should be paid, within ten days from the execution of the award, to C." The court refused to make a rule, under the 1 & 2 Vict. c. 110, s. 18, ordering A to pay the 72*l.* 6*s.* to B, there being nothing on the face of the award to show how the payment to C was to enure as a payment for the benefit of B; although there was an affidavit stating that C was agent for B's vessel, and acted as his agent in the matter of the arbitration, and that the money was directed to be paid to him as such agent. *Ib.*

5. *Semble*, that the award did not sufficiently dispose of "the costs and charges in and about the submission, reference, and award." *Ib.*

6. *Attachment for Nonperformance.*] See AFFIDAVIT.

BANKRUPTCY.

1. *Right of True Owner.*] The true owner has a right, at any time before the fiat, to take back his goods which he has allowed the bankrupt to have the possession of as the reputed owner, provided he does so without notice of any prior act of bankruptcy, it being "a transaction" with the bankrupt, within the meaning of the 133d section of the 12 & 13 Vict. c. 106, and therefore protected. *Graham v. Furber*, 333.

2. An order of the Court of Bankruptcy, made under the 125th section of that act, ordering the sale of goods of which the bankrupt was reputed owner, is not final and conclusive against the true owner. *Ib.*

See SALE.

BANKRUPT.

See JOINT OWNER.

BARON AND FEME.

See HUSBAND AND WIFE.

BEQUEST.

See WILL.

BILL OF EXCHANGE.

1. *Sale of — Warranty.*] The vendor of a bill of exchange impliedly warrants that it is of the kind and description that it purports on the face of it to be. *Gompertz v. Bartlett*, 156.

2. Where, therefore, an unstamped bill of exchange, purporting to be a foreign bill drawn at Sierra Leone, but which had been really drawn in London, was sold, and refused payment by the acceptor: —

Held, that the vendee was entitled to recover back the price of the bill, on the ground of a failure of consideration. *Ib.*

3. *Negotiation and Payment.*] In an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded that he accepted for the accommodation of the drawer, that the drawer negotiated the bill for his own use, and paid it when it became due; that it was afterwards delivered by the holder to the drawer, who then, without the consent of the defendant, indorsed it to the plaintiff, without having it re-stamped. The bill, on being produced at the trial, had the name of the drawer on the back, and a memorandum of the date when it was due on the face of it; and it appeared that the drawer delivered it to the plaintiff after that date:

Held, that this was no evidence to go to the jury in support of the allegations in the plea, that the bill was negotiated by the drawer, and paid at maturity, — commenting on *Lazarus v. Cowie*, 3 Q. B. Rep. 459. *Jewell v. Parr*, 281.

Quære, whether the plea was good. *Ib.*

4. *Burden of Proof.*] Action on a bill of exchange drawn by M. upon, and accepted by, the defendant, indorsed by M. to H., and by H. to the plaintiff. First plea, that the bill was accepted by the defendant, and drawn and indorsed in blank by M. without value; that the defendant gave it to E. to get it discounted for the defendant; that E. did not get it discounted, but, in fraud of the defendant, and without

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the consent of M., delivered it to some person unknown; and that neither H. nor the plaintiff gave value for the indorsements to them respectively. Second plea, the same as the first, except that, instead of alleging want of consideration by H. and the plaintiff, it alleged that H. and the plaintiff respectively had notice that the bill had been obtained from the defendant, by fraud. On the part of the defendant evidence was given that E. had obtained possession of the bill by fraud, upon which the judge ruled that the *onus* was cast upon the plaintiff of proving that he gave value:—
Held, that this ruling was correct. *Berry v. Alderman*, 318.

5. *Acceptance — Personal Liberty.*] A bill of exchange directed to the defendant thus: “To J. D., Purser, West Downs Mining Company,” was accepted by him in these terms: “J. D. accepted *per proc.* West Downs Mining Company.” J. D. was a member of the company, but was not authorized to accept bills on their behalf:—
Held, that he was personally liable, [although he stated at the time of accepting, that he would not be personally bound.] *Nicholls v. Diamond*, 403.

6. *Non-Production.*] Where, in an action against the acceptor of a bill of exchange, plea, *non acceptavit*, the defendant’s attorney signed an admission that the acceptance was in the handwriting of the defendant, without adding the usual clause, “*saving all just exceptions to the admissibility of evidence*”:—
Held, that the jury were warranted in finding for the plaintiff, notwithstanding the non-production of the bill. *Chaplin v. Levy*, 519.

Effect of giving, upon Statute of Limitations.] See LIMITATIONS.

BOND.

1. *Action on.*] In an action on a bond, money cannot be paid into court. *Bishop of London v. McNiel*, 511.

2. *Payment into Court.*] In an action on an administration bond, breaches were assigned in the declaration, and the defendant, by way of plea, set out the condition, and paid money into court as to certain breaches, and as to the residue averred performance or excuse for non-performance:—
Held, that the plaintiff was entitled to strike out the whole plea, and proceed to assess damages. *Ib.*

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CHURCH DISCIPLINE ACT.

Proceeding against a Clergyman.] To a citation against a clerk in holy orders, under the Church Discipline Act, the clerk appeared under protest, on several grounds: first, that the 3d section limited the number of parties complaining to one; secondly, that the charges were laid between March, 1850, and June, 1851, the letters of request were not sent to the Court of Appeal till after the 22d May, 1852; thirdly, that the bishop of the diocese could not substitute himself for the original promoters; fourthly, that the offences being charged between March, 1850, and June, 1851, and the decree being dated September, 1852, the offences may have been committed more than two years before the institution of the suit in the Court of Arches, the proceedings there being viewed as original proceedings:—

Held, that the first, second, and third objections, failed, but that the fourth was a good objection; and the clerk was dismissed. *Bishop of Hereford v. Thompson*, 610.

CHURCHYARD.

Altering Boundaries.] A faculty for altering the boundaries of a churchyard, and diverting part of the consecrated ground to secular purposes, refused. *Rector of St. John's v. Parishioners thereof*, 595.

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CONTRACT.

1. *Construction — Action.]* A declaration against the clerk to a committee of visitors of a county lunatic asylum, under the 8 & 9 Vict. c. 126, ss. 16, 17, stated, that the committee under the statute agreed with the plaintiff, in consideration that he would render his services as an architect in examining the site of a proposed lunatic asylum, and preparing the requisite probationary drawings for the committee, and all other drawings required to be submitted to the Commissioners in Lunacy and the Secretary of State, that a certain sum should be paid to him, and averred that he did prepare requisite probationary drawings for the approval of the said committee, and was ready to prepare all other drawings to be submitted to the commissioners and Secretary of State, but that the committee wrongfully discharged him, and prevented him from completing the agreement. Second plea, that the plaintiff did not prepare the requisite probationary drawings. Fifth plea, that a reasonable time had elapsed for the plaintiff to prepare the requisite probationary drawings for the approval of the said committee, and that the plaintiff prepared divers drawings which were not approved of by the committee, but rejected by them, and that, save as aforesaid, the plaintiff did not prepare any probationary drawings for the approval of the committee, wherefore, &c. : —

Held, that “probationary” drawings meant drawings to be approved of by the committee, the commissioners, and the Secretary of State; that if any of the visitors could contract for the payment for plans not approved of, yet there was no contract here which would make them liable for dismissing the plaintiff; and that the plaintiff could not recover on the *indebitatus* counts. *Moffatt v. Dickson*, 291.

Quære, first, whether the visitors had power to contract for the payment for plans not ultimately approved of; secondly, whether mandamus to the treasurer of the county would be the proper remedy in such a case; thirdly, whether the clerk could be sued; and whether the county would be liable on such a contract. *Ib.*

2. *Construction of.]* In March, 1853, H., by parol, sold goods to the defendant, at an agreed price, and the defendant then took possession. In the following May, by articles of agreement, it was agreed between them as follows : — “That H. shall sell, and the defendant shall purchase (the same goods,) and that the price to be paid for the same shall be the fair amount of the value thereof, such amount to be settled, in case the parties shall differ as to the same, by arbitration in manner hereinafter mentioned, and that the defendant shall pay to H. the amount of such price within two calendar months after such price shall have been fixed as aforesaid.” The defendant continued in possession of the goods, and never objected to the price originally fixed. H. having become bankrupt in August, his assignees, in November, sued the defendant for the amount, as for goods sold and delivered : —

Held, that in the absence of evidence that the parties had differed since March as to the amount then fixed, it was not shown that the event upon which the arbitration clause was to apply, had ever arisen, and that the fair value mentioned in the agreement must be taken to be the value previously ascertained and agreed to. *Cannan v. Fowler*, 328.

3. *Consideration.]* To an action on a promissory note given by the defendant to his father, the defendant pleaded that he, the defendant, had just grounds to complain of the distribution that his father had made of his property, as his father had admitted; and that it was therefore agreed between them that the defendant should cease forever to make any such complaint, and that in consideration thereof, his father would discharge him from liability on the note and the cause of action in respect thereof; and that the defendant’s agreement should be accepted in full satisfaction and discharge, and that it was so accepted : —

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Held, that the plea was bad, as not showing any consideration for the promise by the father. *White v. Bluett*, 434.

4. *Consideration.*] To an action for money lent, and for interest, the defendant pleaded, as to the money lent, that originally no interest was payable to the plaintiff's testator, but that afterwards it was agreed that the defendant should pay interest, and should not be required to pay the principal until the expiration of six months' notice by the testator, requiring payment, and that no such notice had been given. The defendant and the testator were merchants, and in 1847 the defendant was indebted to the testator in a balance, which was thus stated in a letter sent by the testator to the defendant in January, 1847:—

	£	s.	d.
"Balance as by my book	749	8	7
Deduct as allowed	464	16	6
	£284 12 1		

The balance settled as due by you to me payable in the course of the present year, without interest." To this statement the defendant assented. There was evidence of an usage amongst merchants to pay interest upon balances. It was proved that in June, 1848, the testator agreed not to require payment of the principal until the expiration of six months' notice of payment:—

Held, that as by the terms of the testator's letter, and by the mercantile usage, interest was payable at the end of 1847, there was no consideration for the testator's agreement not to require payment until after six months' notice, and that the plea was not supported. *Orme v. Galloway*, 521.

5. *Variance.*] The declaration stated that the plaintiff entered into the service of the defendant as a commercial traveller at a yearly salary, and that the defendant agreed to continue him in his employ for a whole year, and then alleged that the defendant discharged him. It was proved that there was a usage in the trade that commercial travellers should be dismissed with a three months' notice:—

Held, that the contract was not proved, the condition as to the notice not being in defeasance of the contract, but forming a part of it; but that the plaintiff ought to have been allowed to amend at the trial, without costs. *Metzner v. Bolton*, 537.

6. *Nudum Pactum.*] The defendant, in June, 1853, retained the plaintiff, an attorney, to conduct an action for him, and in July obtained an order to sue in *formâ pauperis*. On the 8th December an order for dispaupering him was obtained from the Master of the Rolls, who ordered it to relate back to the 31st of October, at which time the defendant became possessed of property on the death of his father. The defendant, whilst the pauper order was in force, had stated to the plaintiff that he would pay his costs on his father's death:—

Held, that as the dispaupering order only related to the litigating parties and not to their attorney, the plaintiff was not entitled to claim from the defendant payment of the costs incurred between the 31st of October and the 8th of December; that the defendant's promise to pay the same was *nudum pactum*, and that the plaintiff was not entitled to be paid his charges for copying, nor for counsel's fees which he had not paid. *Holmes v. Penney*, 540.

See BILL OF EXCHANGE.

For a Ship—Construction of.] See TROVER.

Description of.] See ASSUMPSIT.

Construction of.] See MASTER AND SERVANT.

With Insane Person.] See LUNATIC.

CONTRIBUTION.

Members of a Club.] Where the members of a club, at a general meeting, authorize the members of the committee of management to borrow money on their own responsibility, but with the guarantee of the society for its repayment, and the money is borrowed and placed to the account of the committee, and one of the committee draws checks upon the bank in which the money is, and otherwise so conducts him-

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self as to show his knowledge of the whole transaction, he is liable to an action for contribution by another member of the committee from whom the lender has received the whole sum. *Mountcashell v. Barber*, 362.

CONVERSION.

See JOINT OWNER.

COPYHOLD.

1. *Joint Devisees.*] Where a copyhold estate is devised to several as joint tenants, the lord is bound to admit any one of them to the entirety, and cannot refuse to do so on the ground that the amount of fine claimed by him is not paid. *Regina v. Wastead*, 160.
 2. *Surrender.*] A copyhold tenant cannot compel his lord to accept and enrol a surrender "to such uses and in such manner as A. shall appoint," which surrender is executed and to take effect in the lifetime of the copyhold tenant.
- Difference between a surrender to uses under a will, and a surrender to the uses of a nominee *inter vivos*, — the former being founded on a custom, the latter without authority. *Flack v. Master of Downing College*, 251.

CORPORATIONS.

Property liable for Debts.] Property acquired by a municipal corporation after the passing of the stat. 5 & 6 Will. 4, c. 76, is not liable to be taken in execution for debts due before that period. *Arnold v. Ridge*, 242.

COSTS.

1. *Indivisible Issue.*] Action for a libel. Plea justifying, as true, part of the libel, which comprised several libellous allegations. Replication, *de injuria*.
On the trial, the judge asked the jury to find separately as to the truth of the several allegations justified. The jury found that some of the allegations were not true, and that others, forming an important part of the libel, were true. A general verdict was entered for the plaintiff. A judge made an order that the master should not allow plaintiff the costs of the witnesses called only to disprove that part of the plea which was found to be true. On a motion to rescind this order : —
Held, by Lord Campbell, C. J., Patteson and Coleridge, JJ., that the order was improper, the issue being indivisible.
Erle, J., *dissentiente*. *Biddulph v. Chamberlayne*, 204.
2. *Verdict less than 40s.*] The first count charged the defendants with damaging a party-wall by excavating it, and overloading it. Plea, as to the overloading, not guilty; and as to the excavating, payment of 30*l.* into court. Replication, damages ultra. At the trial, the verdict was entered for the plaintiff, damages 2,000*l.*, costs 40*s.*, subject to the award of an arbitrator, to whom the cause was referred on the usual terms, but without power to certify for costs under the 3 & 4 Vict. c. 24, s. 2, and he directed the verdict to be entered for the plaintiff on the first issue, with 20*s.* damages, and for the defendant on the second : —
Held, that the plaintiff had recovered by verdict less than 40*s.* damages, and that, therefore, the 3 & 4 Vict. c. 24, s. 2, applied, and deprived him of costs. *Reid v. Ashby*, 233.
3. *County Court.*] The exception in the 11th section of the County Courts Extension Act, 13 & 14 Vict. c. 61, as to costs in the case of judgment by default, applies to interlocutory as well as to final judgment by default. *Glynne v. Roberts*, 456.
4. *Taxation of.*] Two plaintiffs brought separate actions and recovered damages against the same defendant, in respect of a distinct injury sustained by each of them from the same cause. The same attorney was employed by both plaintiffs, and the briefs in each case were to a certain extent similar. The master, in taxing the plaintiff's costs, treated those portions of the briefs in each action which were similar, as a brief and a draft brief, and taxed the costs accordingly. He then added together the costs of such brief and of the draft, and allowed half the aggregate amount to each plaintiff : —

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Held, that the taxation was wrong, it not being the duty of the master to take into consideration that the same attorney was employed by two parties, unless the actions had been consolidated. *Muckier v. Whitehead*, 501.

Security for.] See HUSBAND AND WIFE. SALVAGE. SHIPS AND SHIPPING.

COUNTY COURT.

1. *Appeal from.*] A county court judge, in settling a case for an appeal, directed that a certain document should be inserted, and he signed the rough draft upon the understanding that the document was to be set forth in the fair copy. The draft was also sealed with the seal of the County Court. The judge afterwards refused to sign the fair copy containing the document, he then considering that he was *functus officio* by having signed the improper draft:—

Held, that the judge was not *functus officio*, but that he ought to sign and send up the perfect case. *Figg v. Wilkinson*, 411.

2. *Prohibition.*] Where a county court judge decides that the particulars of a claim in an interpleader summons are not sufficient according to the rules made under the County Courts Act, and refuses on that account to hear the claimant, a prohibition lies to stay the further proceedings under the execution, if the particulars ought to have been held sufficient. *Hardy v. Walker*, 448.

3. A claimant, in the particulars delivered, in pursuance of the 145th rule, was described as of 24 Elizabeth Street, Islington, whereas his true address was 20 Elizabeth Terrace, Islington:—

Held, that the address was sufficiently set forth; and that the county court judge was not justified in dismissing the summons. *Ib.*

4. *Appeal.*] No appeal lies from the decision of a county court judge on an interpleader proceeding arising out of a claim to goods taken in execution to satisfy a judgment of the County Court. *Beswick v. Boffey*, 477.

5. *Appeal.*] No appeal lies from the decision of a county court judge in an action for an amount exceeding 50*l.*, brought before him by consent, under sect. 17 of the 13 & 14 Vict. c. 61. *Groves v. Janssens*, 481.

6. *Signing case.*] A county court judge, after settling a draft case for an appeal, signed it on the understanding that the plaintiff was to furnish to the defendant, the appellant, a copy of a certain document, which was to be set out in the case, and that then the judge would sign the fair copy of the case. The draft case was also sealed with the seal of the County Court. Three days afterwards the plaintiff sent the document to the defendant, who immediately inserted it in the case and sent two copies of the complete case to the rule office of this court within three days from the day that he had got the document and perfected the case, but more than three days after the draft case had been signed. The judge, when applied to, refused to sign the fair case, thinking that he had no power to do so, and the appellant thereupon entered the draft case signed by the judge, with the document appended to it, as the case to be heard on appeal. The respondent contended that the court had no jurisdiction to hear the appeal, on the ground that if the draft case were considered the case the copies had not been sent to the rule office within three days, pursuant to rule 163 of the New County Court Rules, and that there was no signed case at all unless the signed draft case were the case:—

Held, that, as the respondent had assented to the judge's signing the draft case provisionally, the case as against him was not to be considered as signed and sealed until the day on which the document was inserted; and that, as on that view the service of the copies was in due time, the court had jurisdiction to hear the appeal. *Figg v. Wilkinson*, 535.

COVENANT.

1. *To repair Damages.*] Covenant by lessee against an assignee for damages occasioned by the non-repair of premises by the assignee whilst he was such, pursuant to his covenant. It appeared that in 1843 the plaintiff assigned the lease to the defendant; that in October, 1851, the defendant assigned to one T.; that in June, 1852, T. assigned the lease to H., who, in August, 1852, surrendered it to the ground

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landlord. Evidence was given for the plaintiff, that when H. held the lease, the premises were out of repair, and T. stated that he put the premises in no better state than when he received them from the defendant. No further evidence was given, and the defendant was not called as a witness : —

Held, that the judge was right in directing the jury to give substantial damages ; and that the jury were warranted in presuming that the dilapidations took place during the time the defendant held the lease. *Smith v. Peat*, 471.

2. *Condition broken — Assignment of Reversion.*] E, the tenant of leasehold premises, underlet a portion of them to B for a term of years, reserving a few months' reversion. B covenanted to complete some cottages on the premises by the 25th of June. By an indenture, made on the 30th of July following, which recited that E had entered into several agreements and under-leases affecting the leasehold premises, the particulars of which were known to J, it was witnessed that E did "bargain, sell, assign, transfer and set over the said leasehold premises, with their appurtenances, and all the estate, right, title, and interest of him the said E in, to, or out of the said premises and every part thereof to J, to have and to hold the said premises and every part thereof, for the residue of the term of years granted by the indenture of lease under which E held, and all other the estate and interest of the said E therein or thereout, subject nevertheless to the agreement and under-leases hereinbefore referred to." B did not build the cottages by the 25th of June. It did not appear whether E knew of the fact, or elected to treat the default as a breach of covenant and a forfeiture of the lease : —

Held, that assuming that the non-completion of the cottages was a breach of covenant, and gave E a right of re-entry before the assignment to J, and that the statute 8 & 9 Vict. c. 106, s. 5, enabled E to assign the right of entry for condition broken, yet that the language of the indenture was not sufficient to transfer that right to J, so as to enable him to take advantage of the forfeiture. *Hunt v. Remnant*, 545.

Construction of proviso in.] See HUSBAND AND WIFE.

CUMULATIVE REMEDIES.

See SHIPS AND SHIPPING.

DAMAGES.

Sale of Goods.] The measure of damages in the case of a breach of a contract to deliver goods at a specified time, is, the difference between the contract price and the market price at the time of the breach of contract, or the price for which the vendee had sold ; but the latter cannot recover, as special damage, the loss of anticipated profits to be made by his vendees. *Peterson v. Ayre*, 382.

When not liquidated.] See SET-OFF.

In Trover.] See TROVER.

See COVENANT. NEW TRIAL.

DAY.

Computation of part of.] See TIME.

DEBT.

Exchange.] An action of debt is not maintainable upon an agreement that the defendant would carry certain goods for the plaintiff, in consideration that the plaintiff would carry a like quantity for the defendant. *Bracegirdle v. Hincks*, 534.

DECEIT.

Action for — Evidence.] Although there is not so much strictness required in pleadings in the courts in the Isle of Man as in England, yet where a declaration in an action for deceit contains specific averments of fraud, such averments must be established by proof to entitle the plaintiff to recover. *Moore v. Lucas*, 70.

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DEFAMATION.

See SLANDER.

DESCRIPTIO PERSONÆ.

See BILL OF EXCHANGE.

DETINUE.

See JOINT OWNER.

DILAPIDATIONS.

See COVENANT.

DISCHARGE.

See PAYMENT.

DISTRESS.

See HIGHWAY.

DURESS.

See MONEY PAID.

EASEMENT.

1. *Party Walls.*] Where the owner of land builds houses upon it, adjoining each other so as to require mutual support, there is, either by a presumed grant, or by a presumed reservation, a right to such mutual support, and such right is not affected by subsequent subdivision of the property. *Richards v. Rose*, 406.
2. *Right of Support.*] Therefore, where B., the owner in fee, demised land to P. on a building lease, and P. erected two houses adjoining each other, and subsequently underleased to W., who mortgaged the two houses, and the assignee of the mortgagee under a power of sale, sold one house to the plaintiff, and subsequently sold the other to the defendant, it was
Held, that the plaintiff was entitled to maintain an action against the defendant for excavating, under his own house, and removing his own soil, whereby the plaintiff's house was deprived of support, and sank. *Ib.*

EDUCATION.

Of Minors.]

See HUSBAND AND WIFE.

EJECTMENT.

1. *Grant by several.*] By an indenture, reciting that A. and the other parties of the first part, were severally in the occupation of encroachments which had been made on a common, by inclosing land, and building cottages thereon, those parties jointly conveyed all the encroachments, &c., to the parties of the second part, in fee, in trust for the commoners, provided that the parties of the first part and their wives should have the liberty and privilege of occupying the respective messuages conveyed, at the rent of 1s. yearly, payable to J. C. (one of the trustees) as lord of the manor:—
Held, first, that one conveyance stamp was sufficient, there being a community of the same subject-matter as to all the grantors. *Doe d. Croft v. Tidbury*, 340.
2. *Reservation.*] Secondly, that the proviso was not a re-grant to the encroachers of a life-estate, so as to require an additional stamp, but merely a personal liberty or privilege, which might be treated as part of the consideration for their execution of the deed, the common object of which was to extinguish their rights after their

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deaths, and in the mean time to give them liberty and permission to occupy their encroachments. *Ib.*

3. *Encroachments.*] A, after the execution of the deed, and while in possession of his part of the encroachments conveyed, made a fresh encroachment on the waste which adjoined the other, and he occupied the two together for thirty-eight years, but five years before his death, conveyed to B. the latter encroachment for a good consideration : —

Held, in an ejectment by the trustees against B, that as A, when the fresh encroachment was made, was tenant (for life at most) to the trustees, and occupied it with the land of which he was tenant, it must be assumed that he made the fresh encroachment for the aggrandisement of the estate, and that therefore it was part of the holding when the tenancy expired. *Ib.*

4. *Landlord and Tenant.*] Where the power to encroach upon a waste is derived from the occupation of premises held under a landlord, and the encroachment is occupied as if it were part of the holding, at the end of the tenancy, the presumption, as between the landlord and tenant, is, that the encroachment is part of the holding, and it belongs to the landlord ; but the tenant may rebut the presumption by clear evidence that he intended the encroachment for himself at the time he made it. *Ib.*

5. *Limitations.*] A claimant in ejectment proved that his grandfather being seised in fee of a farm, devised it to the claimant's father, as tenant in tail, and died in 1799, and that the father received the rents and profits up to the year 1807, and died in 1850 : —

Held, that the claimant's father having been barred under the 3 & 4 Will. 4., the claimant was barred also. *Austin v. Lewellyn*, 418.

6. *Mesne Profits.*] In ejectment by landlord against tenant, under 15 & 16 Vict. c. 76, s. 214, mesne profits may be recovered, although not specially claimed in the writ or issue. *Smith v. Telt*, 483.

ELECTION.

Majority.] By an order of the Poor Law Commissioners, regulating the proceedings of Guardians of the Poor in the parish of M., the election of officers was to be by a majority of the guardians present at a meeting of the board. By stat. 12 & 13 Vict. c. 103, s. 19, in case of an equality of votes upon any question at a meeting of guardians of any union or parish, the chairman has a "second or casting vote." At an election of clerk to the guardians of M., twenty-two guardians attended. On their assembling, the chairman said he should not vote for any candidate, but merely preside at the meeting as chairman. He did so, and took the votes, of which there were eleven for one candidate and ten for another. The former was declared elected, and entered upon the office. On motion for a *quo warranto* : —

Held, that the chairman could not be considered as having, for the purpose of the election, withdrawn ; and that such election was void, as not having been determined by a majority of the guardians present. *Regina v. Griffiths*, 179.

EMBEZZLEMENT.

1. *Larceny.*] The prosecutor gave some marked money to J. W. to expend at his (the prosecutor's) shop, for the purpose of detecting a servant, of whom the master had suspicions. The servant was convicted of embezzling a portion of the marked money : —

Held, upon the authority of *Rex v. Hedge*, 2 Leach's C. C. 1033, that the conviction was right. *Regina v. Gill*, 550.

2. *Money received on Account of Master.*] W. had contracted with the Great Northern Railway Company to provide horses and carmen for the delivery of their coals. By the terms of the agreement W. was to provide a sufficient number of steady and honest carmen for the delivery of the coals, and "for collecting and duly accounting for the moneys received for the same ;" such carmen were "to obey, perform, and execute" the orders of the company's manager in all things connected with the de-

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livery of the coals, "and receipt and payment of moneys" received by them; and further; it was agreed that W. or the carmen should daily "well and truly pay, account for, and deliver to the said company's coal manager all checks, moneys," &c., which they might receive in payment of the coals. The course of business was for the carmen to receive delivery notes and receipted invoices from the company's office. The former they took to W.'s office for the purpose of being entered in his books, but the invoices were left with the customer on payment of the account. The prisoner was a carman of W., and the case found that it was his duty to pay over direct to the company's clerks any money he received for coals. He, however, having delivered coals to a customer, received the money, and appropriated it to his own use, and was then indicted for embezzling the money of W., his master:—
***Held*, by a majority of the judges, that there was a privity between the prisoner and the company, so as to make him their agent; that he agreed to pay the money to them, and therefore he had not received it on account of W., and was wrongly convicted of embezzling W.'s money. *Regina v. Beaumont*, 558.**

See LARCENY.

ENCROACHMENTS.

See LANDLORD AND TENANT.

ERASURE.

In a Will.]

See WILL.

ERROR.

See EXCEPTIONS.

ESTOPPEL.

***By Deed.*]** A declaration in covenant stated that letters-patent had been granted to the defendant for improvements in purifying gas, and that other letters-patent had been granted to the plaintiff for an improved mode of manufacturing gas, and that certain parts of the plaintiff's invention intended to be secured, had been claimed in the specification; that disputes had arisen between the parties as to their rights under the letters-patent to the use of oxides of iron, for the purpose of purifying gas; that to put an end to such disputes, the parties covenanted with each other for a mutual right of using the patents on the terms of giving notice of the beginning to use the same. Breach, want of notice. Plea, that the plaintiff's patent was not a good and valid patent in this, that it was not new, and the plaintiff was not the true and first inventor:—

***Held*, that the intention of the deed was to prevent disputes between the parties, and that the defendants were estopped by the deed from denying the validity of the patent, its novelty, and that the plaintiff was the true and first inventor. *Hills v. Laming*, 452.**

See PAYMENT. INSURANCE. JOINT OWNER.

EVIDENCE.

1. ***Secondary.*]** Action by the assignee of the reversion on a covenant in a lease. The deed of assignment of the reversion to the plaintiffs, was subject to certain "mortgage debts." The defendant, in order to prove that the legal estate was out of the plaintiffs, called the attorney of a person to whom the mortgage (subject to which the assignment had been made) had been transferred, to produce the mortgage deed under a *subpœna duces tecum*. The attorney refused to produce it, and said that his client had instructed him not to produce it. Another witness was then called to give secondary evidence of the contents of the deed, by means of a draft; and in order to identify the deed with the draft, the judge ordered the attorney to produce the deed, and to allow the second witness to look at the indorsement; upon which the witness identified it as the deed of which the draft was a copy, and thereupon secondary evidence was received of the contents of the deed:—

***Held*, secondly, that the omission to subpœna the client was, under the circumstances,**

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no ground for excluding secondary evidence of the contents of the deed. *Phelps v. Prew*, 96.

2. *Entries.*] In ejectment, the question being whether the premises were parcel or no parcel of a manor, the lessor of the plaintiff produced from his muniments books purporting to be the books of J. V., steward to plaintiff's ancestor, the then Earl of A. In one of those books, J. V. was debited, in 1782, with the receipt of rent for the premises in question. The balance of the account for the half year was struck, but was not signed; under it was written in a different hand, "The above balance is accounted for in a general statement at the end of the year's account, ending Michaelmas, 1793, entered in a subsequent book." This entry was dated Feb. 18, 1795, and was signed by the then earl, and by "J. V., Jun." The balance was carried down in the account, and balances were struck in each half year; none were signed by J. V.; but under each was a similar entry signed by the earl and J. V., Jun., until the end of the last book, where was entered: "Balance due to J. V., 76*l*. 18*s* Feb., 1795.—The above account was this day settled; and the balance, 76*l*., due thereon to J. V., Sen., was paid by the Earl of A. to J. V., Jun., and the vouchers delivered up to his lordship." This was signed by the earl and J. V., Jun. No evidence was given of the character or position of J. V., Jun., or that he was dead, or that he had ever existed:—

Held, that, inasmuch as the entry was produced from the proper custody, and purported to be fifty-five years old, it was not necessary to prove that J. V., Jun., was dead. And that, inasmuch as J. V., Jun., charged himself with the receipt of the last balance, and the entry of the payment of rent was part of the balance in that year which was carried down so as to form part of the last balance, the entry was admissible evidence of the payment of rent. *Doe v. Michael*, 180.

3. *Of Usage.*] The defendant chartered the plaintiff's vessel to proceed to Newcastle-on-Tyne, and there be ready forthwith "in regular turns of loading," to take on board by spout or keel, as directed, a complete cargo of four keels of coal, and the remainder coke. In an action for not loading the vessel with coke within a reasonable time:—

Held, that evidence was admissible to explain the meaning of the expression in the charter party, "in regular turns of loading," by showing that there was a usage of the port of Newcastle that vessels should take in their cargoes of coke in a certain regular order or turn; and that the question, whether the vessel was loaded within a reasonable time, ought not to be decided without reference to such usage, if proved. *Leidemann v. Schultz*, 305.

4. *Stamp.*] A document, not purporting on the face of it to be a receipt for the payment of money may be shown to be a receipt by evidence aliunde, and thus be brought within the stamp laws. *Regina v. Overton*, 567.

5. *Receipt.*] Therefore, where it was proved to be the course of business between two parties, upon the payment of money in discharge of debts due from one to the other of them, merely to get the signature of the party receiving the amount, to an entry in a book containing the date, the name of the creditor, and the amount of the debt, such entry was held to be a receipt within the meaning of the stamp laws. *Ib.*

6. *Collateral Fact.*] Upon the trial of the clerk of the payee, who had so signed his name, for embezzling a sum of money so paid and received, the whole of such entry, though unstamped, and though referring to a sum exceeding 2*l*., was read to the jury for the purpose of identifying the prisoner as the person to whom the money was paid, and who signed the entry:—

Held, that the entry was not admissible in evidence, as, coupled with the extrinsic testimony, it proved a material fact against the prisoner, viz., the receipt of the money, and that, for the purpose of identifying him, only the signature should have been put in and proved after it had been shown that the money was paid to the party who signed the book. *Ib.*

See INSURANCE. BILL OF EXCHANGE. LANDLORD AND TENANT. PAYMENT.

EXCEPTIONS.

Misdirection.] A bill of exceptions should state what directions the judge gave on the

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particular issue raised, as it is misdirection, not nondirection, which is the proper subject of a bill of exceptions. *Anderson v. Fitzgerald*, 1.

EXCHANGE.

Contract for — not a Sale.]

See DEBT.

EXECUTION.

See TRESPASS.

EXECUTORS BEQUEST.

See WILL.

FACTOR.

See PAYMENT. PRINCIPAL AND AGENT.

FALSE IMPRISONMENT.

See ASSAULT.

FALSE PRETENCES.

Inducement.] Upon a charge of obtaining money by false pretences, it is sufficient if the actual substantial pretence, which is the main inducement to part from the money, be alleged in the indictment, and proved; although it may be shown by evidence that other matters not laid in the indictment in some measure operated upon the mind of the prosecutor as an inducement for him to part from his money. *Regina v. Hewgill*, 556.

See *Regina v. Green*, 555.

FELONY.

Forfeiture of Goods.] M. C. died intestate, the wife of a felon under sentence of transportation, and leaving property acquired after the conviction of her husband:—
Held, that such property belonged to the crown as accrued to the felon, and not to the next of kin of the wife. *Coombes v. Queen's Proctor*, 598.

FORFEITURE OF GOODS.

See FELONY.

FORGERY.

Uttering.] The prisoner was indicted for forging a testimonial to his character as a schoolmaster, and other counts of the indictment charged him with having uttered the forged document. The jury acquitted him of the forgery, but found him guilty of the uttering with intent to obtain the emoluments of the place of schoolmaster, and to deceive the prosecutor:—

Held, that this finding of the jury amounted to an offence at common law, of which the prisoner was properly convicted. *Regina v. Sharman*, 553.

FRAUD.

1. *To avoid a Deed.]* By deed of three parts, between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay to the trustees an annuity for the separate maintenance of the wife. The trustee having sued the husband for arrears of the annuity, the latter pleaded that he was induced to make the deed by means of false and fraudulent representations made by the plaintiff to him, that is to say, by the plaintiff, before the making of the deed, falsely and fraudulently representing to him that E, the wife, was a virtuous person, whereas in truth the said E was not a virtuous person, and the plaintiff "had then carnally known the said E, so then being the wife of the defendant, and subsequently to the intermarriage of the said E and the defend-

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ant, and before the making of the deed," which last-mentioned facts the plaintiff concealed from the defendant, and induced him to make the deed, in order that the plaintiff might continue an adulterous intercourse with the said E. At the trial, the plea was proved, and the verdict thereon entered for the defendant:—

Held, on motion to enter judgment for the plaintiff *non obstante veredicto*, that although the plea did not show that the representations set out were necessarily fraudulent, it not being alleged that the plaintiff knew them to be false, or that he knew that E was the defendant's wife at the time he had intercourse with her, yet it might be sustained as a general plea of fraud, which, after verdict, was a good answer to the action. *Evans v. Edmonds*, 227.

2. *Pleading.*] *Held*, also, that it was not necessary to allege that the wife, as *cestui que trust*, was a party to the fraud upon the defendant, as a court of law can only look to the legal rights of the parties to the deed. *Ib.*

3. *Semble*, per Maule, J., that if the plaintiff, intending to deceive the defendant for the plaintiff's own advantage and the defendant's disadvantage, induced the latter to make the deed by representing a fact to be true which was not true, but about which the plaintiff knew nothing, that would amount to fraud, and avoid the deed. *Ib.*

See ASSUMPSIT. BILL OF EXCHANGE. LARCENY. LIFE INSURANCE. PRINCIPAL AND SURETY.

HABEAS CORPUS.

See ARREST.

HIGHWAYS.

1. *Costs of Indictment.*] The costs of an indictment against a parish for non-repair of a highway, ordered to be paid to the prosecutor by the Quarter Sessions, under section 95 of the 5 & 6 Will. 4, c. 50, are not recoverable by distress against the surveyor, under section 103, but are to be paid out of the rate made and levied in pursuance of that act. *Harrison, ex parte*, 152.

2. *Duty of Surveyor.*] It is the duty of the surveyors who are in office when such an order for costs is made, or of their immediate successors in office, to pay the costs out of any funds then in their hands, or, if they have none, to make a rate for the purpose of putting themselves in funds. *Ib.*

HIRING.

Contract for.]

See MASTER AND SERVANT.

HUSBAND AND WIFE.

1. *Separation Deed — Fraud.*] By deed of three parts between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay to the trustees an annuity for the separate maintenance of the wife. The trustee having sued the husband for arrears of the annuity, the latter pleaded that he was induced to make the deed by means of false and fraudulent representations made by the plaintiff to him, that is to say, by the plaintiff, before the making of the deed, falsely and fraudulently representing to him that E, the wife, was a virtuous person, whereas in truth the said E was not a virtuous person, and the plaintiff "had then carnally known the said E, so then being the wife of the defendant, and subsequently to the intermarriage of the said E and the defendant, and before the making of the deed," which last-mentioned facts the plaintiff concealed from the defendant, and induced him to make the deed, in order that the plaintiff might continue an adulterous intercourse with the said E. At the trial, the plea was proved, and the verdict thereon entered for the defendant:—

Held, on motion to enter judgment for the plaintiff *non obstante veredicto*, that although the plea did not show that the representations set out were necessarily fraudulent, it not being alleged that the plaintiff knew them to be false, or that he knew that E was the defendant's wife at the time he had intercourse with her, yet it might be

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- sustained as a general plea of fraud, which, after verdict, was a good answer to the action. *Evans v. Edmonds*, 227.
2. *Held*, also, that it was not necessary to allege that the wife, as *cestui que trust*, was a party to the fraud upon the defendant, as a court of law can only look to the legal rights of the parties to the deed. *Ib.*
3. *Seemle*, per Maule, J., that if the plaintiff, intending to deceive the defendant for the plaintiff's own advantage and the defendant's disadvantage, induced the latter to make the deed by representing a fact to be true which was not true, but about which the plaintiff knew nothing, that would amount to fraud, and avoid the deed. *Ib.*
4. *Liability of Husband.*] In an action for goods supplied to the wife on her order alone, the question is, (in the absence of such evidence of necessity as may show an agency in law,) whether there was an agency or authority in fact; and where the question had been left to the jury solely on the point whether the goods were necessities:—
Held, a misdirection, and a new trial granted. *Read v. Teakle*, 332.
5. *Separation Deed.*] In a deed of separation, there was the following covenant by the defendant, the father of the children therein named: That, for providing for the maintenance of the children, he would, out of his own moneys, pay the whole expense of their education, maintenance, and support, except as thereafter mentioned, all of whom it was agreed should be and remain in the custody and under the complete control of the defendant. Then followed a proviso, that the mother of the children, or her trustees, should pay the expense of the education, maintenance, and support of such of the children as should be from time to time permitted by the defendant to reside with the mother, during the period of such residence:—
Held, that the covenant by the defendant to maintain, was general, and not limited to the minority of the children, or to the period of their remaining under his control and custody. *De Crespigny v. De Crespigny*, 422.
6. *Action by wife, stayed.*] An action having been brought by a married woman as executrix, in which her husband was made co-plaintiff, the court refused to order the proceedings to be stayed altogether, but ordered they should be stayed until security was given to the husband by the attorney against the costs of the action, the affidavits showing that the husband and wife were living separate, and that the action was brought without his sanction and against his will. *Proctor v. Brotherton*, 518.

INCOME TAX.

A civil servant of the E. I. C. in receipt of an annuity out of the Civil Service Pension Fund, is entitled, while resident abroad, to receive it free from income tax. *Udney v. East India Co.* 290.

IDIOT.

See LUNATIC.

INDENTURE.

Of Apprenticeship.]

See APPRENTICE.

INFANT.

Parent liable for Support.] See HUSBAND AND WIFE. PAYMENT.

INSOLVENT.

Arrest of.] The defendant settled an action brought by the plaintiff by giving a judge's order for the payment of 100*l.* and costs by certain instalments. He then filed his petition in the Insolvent Debtors Court under 7 & 8 Vict. c. 96, and inserted the plaintiff in his schedule as a creditor for the amount specified in the judge's order. Default having been made in the payment of the instalments, judgment was signed. The defendant's examination was adjourned *sine die*, and on the same day he was arrested under a *ca. sa.*, at the suit of the plaintiff, upon the judgment so

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signed. He applied to a judge at chambers for his discharge, alleging that he was privileged from arrest at the time he was taken, because he was on his way to a judge's chambers. He was discharged on a second order being made for payment of the debt and costs by different instalments. The defendant shortly afterwards obtained an order protecting him from arrest under any process in respect of the debts due at the time of his filing his petition to the persons named in the schedule. He was then arrested under a *ca. sa.* issued on a judgment signed under the second judge's order:—

Held, that he was entitled to be discharged, the arrest being in respect of the debt inserted in the schedule. *Hockpayton v. Bussell*, 475.

See MONEY PAID.

INSURANCE.

1. *Marine — Time Policy.*] Time policy in the usual form on the good ship "The Susan," lost or not lost, in port and at sea, in all trades and services whatsoever and where-soever, during the space of twelve calendar months, commencing on the 25th September, 1843, and ending on the 24th September, 1844. To an action on the policy, the underwriter pleaded that the ship was not, at the time of the commencement of the risk in the policy mentioned, nor at the making of the said insurance, nor on the 25th September, 1843, seaworthy:—

Held, affirming the decision of the Exchequer Chamber, which reversed the decision of the Court of Queen's Bench, that the plea was bad in law. *Gibson v. Small*, 16.

2. *Seaworthiness.*] In a voyage policy, the law implies a condition of seaworthiness, but no such condition is implied in regard to time policies. *Ib.*

3. *Semble*, "If, however, a ship be about to sail on a particular voyage, and a time policy be effected instead of a voyage policy, I think, as at present advised, that the condition of seaworthiness at the commencement of the voyage, would be implied." — Per Lord St. Leonards. *Ib.*

4. *Sed contra* — "As at present advised, I should decide against the implied condition in all cases of time policies, and should be glad if it were understood, that in all voyage policies there is, and in no time policies framed in the usual terms is there, a condition of seaworthiness implied." — Per Lord Campbell. *Ib.*

5. *Capture by Pirates.*] A vessel insured by a time policy was, during the risk, captured by pirates, and being shortly after recaptured by an English ship of war, was taken possession of by a prize crew, and sent to England for the purpose of being adjudicated upon in the Court of Admiralty. While on her return, and after the expiration of the risk, she met with sea damage, and was taken into a port to be repaired, where she was sold by the prize master. From the time of the recapture to the sale, the ship was in the possession and under the control of the prize crew, and not of her own crew. On her arrival in England, proceedings were taken in the Admiralty Court without prejudice to the legal right of the parties, and possession was decreed to the owners. After the termination of the risk, but as soon as the assured received intelligence of the capture by the pirates, they gave notice of abandonment:—

Held, that under the above circumstances, the assured were entitled to recover as for a total loss. *Dean v. Hornby*, 85.

6. *Signature to Declaration — Question for the Jury.*] The plaintiffs (the B. Insurance Company) re-assured, with the defendants, (another insurance company,) the life of D., which they had themselves previously assured to a larger amount. When the proposition to re-assure was made, the defendants sent to the plaintiffs a printed form containing nineteen questions relative to the age, health, and habits, &c., of the person whose life was to be re-assured; and a declaration to be made by him, that he was then in good health, and not afflicted with any disease tending to shorten life, and also, by the plaintiffs' agreeing that if any untrue statements were contained in such declaration or the answers to the questions, the assurance should be void. When this document was sent by the defendants, they had filled up the answers to the first five questions, but the rest were included in a brace, against which was written, "for these particulars see copies of B. papers attached." At the foot of these words the

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plaintiffs' agent had signed his name. Neither the plaintiffs nor D. had signed the printed paper in any other part, and blanks were left for the signatures to the declaration. This document was returned to the defendants with copies attached of the papers delivered to the B. office on the original assurance, which were properly signed by D., the answers to which were admitted to be true when given. The defendants signed the policy, which recited that the plaintiffs had delivered to the defendants a declaration signed by them, setting forth the past and present state of health of the person whose life was assured, and stated that such declaration was to be the basis of the contract, and if any thing untrue were averred in it, the policy was to be void. The plaintiffs accepted this policy, and paid the premiums upon it. At the time when this re-assurance was effected, D. was living abroad, and was afflicted with a mortal disease, of which he soon afterwards died; but this fact was unknown to the plaintiffs or the defendants. An action being brought on the policy, (which was set out in the declaration,) the defendants pleaded that the plaintiffs untruly stated, in the declaration mentioned in the policy, that D. was, at the time of making it, in good health, and issue was taken on this plea. At the trial, evidence was given of the facts above stated. The defendants applied for a nonsuit on the ground that the plaintiffs, by their agents, must be taken to have signed the declaration on which the policy was founded. The judge refused to nonsuit, and directed the jury to say whether the meaning of the parties was, that the plaintiffs undertook that D. was then in good health, or that the defendants were to decide whether they would re-assure upon the statements appearing in the original papers; and he handed to the jury the whole of the documents in evidence, in order that they might form their opinion whether the signature applied to the declaration, or only to the particular questions against which it was placed:—

Held, by Lord Campbell, C. J., Coleridge, J., and Wightman, J., that the question whether the plaintiffs had signed the declaration, was for the jury, and not for the judge, to decide. *Foster v. Mentor Life Assurance Co.* 103.

7. *Parol Evidence to Contradict.*] But per Erle, J., that the plaintiffs, suing on the policy, could not give parol evidence to contradict the statement contained in it. *Ib.*

8. *Estoppel by Silence.*] Secondly, (by Wightman, J., and Erle, J.,) that the jury were misdirected in not being told that the plaintiffs, having accepted the policy containing the recital that they had signed the declaration without objection, were *primâ facie* concluded by that recital. *Ib.*

9. Per Lord Campbell, C. J., and Coleridge, J., that the direction was right, as assuming that the plaintiffs had not signed the declaration, they were not under the circumstances precluded from denying that they had done so. *Ib.*

10. *Usage.*] Evidence was given that it was usual where insurance offices re-assured lives, on which they had before granted policies, for the office proposing such re-assurance to submit to the office granting it the papers on which the original assurance was effected, and for the latter office to accept or decline such re-assurance on the statements contained in those papers:—

Held, by Lord Campbell, C. J., that the evidence of this usage was admissible to show that no declaration as to the present health of D. was signed by the plaintiffs — *dis-sentientibus* Coleridge, J., and Erle, J. *Ib.*

See LIFE INSURANCE. SET-OFF.

INTEREST.

See *Orme v. Galloway*, 521.

INTERLINEATIONS.

In a Will.]

See WILLS.

INTERPLEADER.

Title of Third Party.] Upon an interpleader issue whether certain goods and chattels seized in execution were "at the time of the seizure the goods and chattels of the plaintiff," the plaintiff proved a bill of sale of the goods to himself:—

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Held, that the defendant, the execution creditor, might set up, by way of answer, a prior bill of sale to a third party. *Gadsden v. Barrow*, 543.

JOINT OBLIGEES.

See APPRENTICE.

JOINT OWNER.

1. *Authority of One.*] Detinue for documents of the plaintiff. Plea, that they were delivered to the defendant by persons jointly interested in them with the plaintiff; that the said persons never demanded them back; and that the defendant held with their consent. The evidence was, that the plaintiff was a shareholder and purser in the B. Mining Company, and that he had delivered the documents to the defendant, an accountant, in pursuance of a resolution of the shareholders, in order that the defendant might report on the state of the company's affairs, and that the plaintiff in his own name, and not on behalf of the other shareholders, had demanded them back : —

Held, that the plea raised a good defence, and was proved. *Atwood v. Ernest*, 262.

2. *Power of One.*] After the bankruptcy of one of two joint owners of goods, the solvent joint owner may authorize the sale of the goods, and the broker who sells pursuant to such authority, may set it up as a defence in an action by the assignees of the joint owner who has become bankrupt, under the plea of *non detinet*. *Morgan v. Marquis*, 394.

3. *Estoppel.*] The circumstance that the broker was in the first instance employed by the bankrupt, and had no knowledge of any other person being interested in the goods, is immaterial, nor is the broker estopped from setting up the joint ownership by having sent to the assignees an account in which the goods were stated to have been sold for the bankrupt alone. *Ib.*

JUDGMENT.

1. *In County Court.*] The decision of the Court of Queen's Bench, in *Berkley v. Alderkin*, 1 El. & Bl. 805; s. c. 18 Eng. Rep. 377, that an action cannot be maintained in a superior court on a judgment obtained in a county court constituted under the 9 & 10 Vict. c. 95, ought to be followed by courts of coördinate jurisdiction with the Queen's Bench. *Austin v. Mills*, 491.

2. *Action on.*] An action cannot be maintained for the cause of action in respect of which judgment has been recovered in such a county court. *Ib.*

Action on.]

See PLEADING.

JURY.

What is a question for.]

See INSURANCE.

Duty of.]

See NEW TRIAL.

LANDLORD AND TENANT,

Uses and Occupation.] In an action for use and occupation of a house, the undersheriff directed the jury that actual occupation by the defendant was not necessary to support the action, but that a constructive occupation would do, but did not tell them what a constructive occupation was : —

Held, a misdirection. *Towne v. D'Heinrick*, 235.

Obligation of Former.]

See NUISANCE.

See COVENANT. EJECTMENT.

LARCENY.

1. *Proof of Act.*] The prisoner was found coming out of a warehouse, where a large quantity of pepper was kept, with pepper of a similar quality in his possession. He had no right to be in the warehouse, and on being discovered said, "I hope you will

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not be hard with me," and took some pepper out of his pocket and threw it upon the ground. There was no evidence of any pepper having been missed from the bulk ;—
Held, that there was sufficient evidence to go to the jury of the *corpus delicti*. *Regina v. Burlon*, 551.

2. *Regina v. Dredge*, 1 Cox's C. C. 235, considered. *Ib.*

3. *Master and Servant.*] It was the prisoner's duty, as bailiff to the prosecutor, to pay and receive moneys. Upon an account rendered of such payments and receipts, it appeared he had charged his master with five payments of 1*l.* 8*s.*, instead of 1*l.* 4*s.*, the sums he had actually paid. There was also a similar overcharge of two other amounts :—

Held, that the prisoner was wrongly convicted of larceny, the offence, if any, being that of obtaining money by false pretences. *Regina v. Hewgill*, 556.

4. *Possession.*] The prisoner was sent with his master's cart for some coals. The coals were delivered to the prisoner and deposited in the cart, their price being entered to the master's account. On the road home the prisoner disposed of a portion of the coals :—

Held, that this was larceny of the coals, and not embezzlement, the prisoner having determined his exclusive possession of the coals when they were deposited in the cart, and the possession from that time being in the master. *Regina v. Reed*, 562.

5. *Subject of—Chose in Action.*] An agreement, although unstamped, is a chose in action, and therefore not the subject of larceny, Parke, B., *dissentiente*. *Regina v. Watts*, 573.

6. *Unstamped Agreement.*] The prisoner was indicted for stealing a piece of paper. At the time it was stolen, the paper contained a signed agreement between the prosecutor and the prisoner, but it was unstamped, although of the value of 20*l.* The original was not produced at the trial, but a copy was given in evidence. The agreement was a building contract, and all moneys due under it, except some extras, had been paid ; but the work was still going on :—

Held, (Parke, B., *dissentiente*,) that the piece of paper, at the time it was taken, was a chose in action, and not the subject of larceny. *Ib.*

See EMBEZZLEMENT.

LAW AND FACT.

See INSURANCE.

LEASE.

See COVENANT.

LIBEL.

See COSTS. SLANDER.

LIFE INSURANCE.

Warranty—False Statements.] F. proposed his life for insurance, and signed a form of "proposal," which contained his answers to twenty-seven questions, the 21st and 22d of which were as follow : 21. Did any of the party's near relations die of consumption, or any other pulmonary complaint? Answer, No. 22. Has the party's life been accepted or refused at any office, &c.? Answer, No." The proposal also contained the following agreement: "I hereby agree that the particulars mentioned in the above proposal, shall form the basis of the contract between the assured and the company ; and if there be any fraudulent concealment or untrue allegation contained therein, or any circumstance material to this insurance shall not have been fully communicated to the said company, or there shall be any fraud or misstatement, all money which shall have been paid on account this insurance, shall become forfeited, and the policy be void." The policy contained a warranty on the part of F. as to most of the facts replied to in the proposal, but not as to questions 21 and 22. It then provided that the policy should be null and void, and all moneys paid by F. forfeited, upon F. dying in certain enumerated modes, "or if any thing so warranted

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as aforesaid shall not be true, or if any circumstance material to this insurance shall not have been truly stated, or shall have been misrepresented or concealed, or shall not have been fully and fairly disclosed and communicated to the said company, or if any fraud shall have been practised upon the said company, or any false statement made to them in or about the obtaining or effecting of this insurance." Upon an action on the policy against the company, it appeared that the answers to questions 21 and 22 were not true:—

Held, reversing the decisions of the Courts of Exchequer and Exchequer Chamber in Ireland, that the judge was wrong in directing the jury, that if they found the statements both false and material, they should find a verdict for the defendant; and that the questions which the judge ought to have left to the jury were, first, were the statements false; and, secondly, were they made in obtaining or effecting the policy. *Anderson v. Fitzgerald*, 1.

2. Observations on the form of this policy, and its ambiguity, and the effect of making some of the statements in the proposal matters of warranty. Per Lord St. Leonards. *Ib.*

LIMITATIONS.

1. *Part Payment by Bill.*] Where a bill of exchange is delivered by a debtor to his creditor, in payment on account of a larger sum then due, under such circumstances as to raise the implication of a promise to pay the remainder, it amounts to a payment within the meaning of the exception in the 9 Geo. 4, c. 14, s. 1, and answers the Statute of Limitations, as from the time of such delivery, whether the bill be subsequently honored or not. *Turney v. Dodwell*, 92.
2. *Foreign Creditor.*] A foreigner who has never been in this country, having a cause of action which accrued to him while abroad, against a person in this country, has six years within which to bring an action in this country, from the time he first comes to this country. *Lafonde v. Ruddock*, 239.
3. *Action for Calls.*] In an action for calls, a plea, that the action was on contracts without specialty, and that the causes of action did not accrue within six years:—
Held, issuable; but afterwards,
Held bad on demurrer. *Cork and Bandon Railway v. Goode*, 245.
4. *Quære*, whether a plea that the shares were forfeited, and that the company had received sufficient thereupon to pay the calls, is issuable. *Ib.*
5. *Acknowledgment.*] W. J., who had previously lent to the plaintiff 200*l.*, which was secured by the promissory note of the plaintiff and two sureties, had goods from the plaintiff's shop to the value of 17*l.* The plaintiff, on remitting to W. J. 10*l.* for interest on the money borrowed, sent in with it his bill for 17*l.* for the shop goods. W. J. answered—"I beg to acknowledge the receipt of 10*l.* cash and the bill amounting to 17*l.*, both of which sums I have placed to your credit. I have inclosed your bill; receipt it, and return it me by post." After the death of W. J., and more than six years after the supplying of the goods, and after one of the sureties had paid the defendants the amount of the promissory note, the plaintiff sued the defendants as representatives of W. J., to recover the 17*l.* The defendants relied on the Statute of Limitations:—
Held, that the letter of W. J. was a sufficient acknowledgement to take the case out of the statute. *Evans v. Simon*, 420.

See EJECTMENT.

LORD'S DAY.

Arrest on.]

See ARREST.

LUNATIC.

Contract.] The plaintiff contracted for the purchase of an estate from the defendant and paid a deposit, on the terms that unless he objected to the title within a certain time the same should be considered as accepted. No objection was made by him to the title. The plaintiff, at the time of the contract and of the payment of the deposit, was a lunatic, incapable of understanding the meaning of a contract, or of

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managing his affairs, and derived no benefit from the contract ; but these facts were unknown to the defendant, who made the contract with him fairly and *bonâ fide*, believing him capable of understanding the meaning of the same : —

Held, that the plaintiff was not entitled to recover the deposit, notwithstanding he was a lunatic incapable of contracting or of understanding the meaning of contracts. *Beavan v. M'Donnell*, 484.

MAJORITY.

Of Votes.]

See ELECTION.

MALICE.

Evidence of.]

See SLANDER.

MANDAMUS.

1. *Costs of.*] Although the costs of obtaining a writ of mandamus, where cause is shown, are in the discretion of the court, yet they ought to be given to the successful party, unless there are strong grounds to the contrary. *Regina v. Harden*, 167.

2. The guardians of the N. Union sued H. in the county court, for their expenses in removing a nuisance, certain justices having made an order for its removal, under the 11 & 12 Vict. c. 123, and which order H. had disobeyed. H. applied at chambers for a prohibition, upon the ground that title to land would come in question. The learned judge did not decide the question, but suggested an application to the full court. This, however, was not made, although the county court judge himself prepared a case. The cause was tried in the county court, and a verdict passed for the plaintiffs. The judge, however, refused to make an order for payment. A mandamus, against which H. had showed cause, was then obtained, mainly upon the construction of the 11 & 12 Vict. c. 123, s. 3 : —

Held, that there were sufficiently strong grounds for exempting the defendant from payment of the costs of obtaining the mandamus. *Ib.*

See PAUPER LUNATIC.

MANSLAUGHTER.

Negligence.] Trustees appointed, under a local act, for the purpose of repairing the roads in a district, with power to contract for executing such repair, are not chargeable with manslaughter, if a person, using one of such roads, is accidentally killed in consequence of the road being out of repair through neglect of the trustees to contract for repairing it. *Regina v. Pocock*, 190.

MARINE INSURANCE.

See INSURANCE.

MASTER AND SERVANT.

1. *Negligence.*] The plaintiff employed the defendant to remove her goods in his cart for hire. With the consent of the defendant's carman, the plaintiff got on the cart with the goods, and on the way the cart broke down, and the plaintiff was seriously injured, and her goods broken : —

Held, that the plaintiff was not entitled to recover damages for the personal injury. *Lygo v. Newbold*, 507.

2. *Liability.*] The plaintiff was a guard in the service of the defendants, a railway company, and his duty was to attach certain carriages to the engine of a goods train, and to despatch the same within a certain time, so as to avoid collision with a passenger train. In consequence of the plaintiff's not having had another person to assist him, the engine started, threw him upon the rails, and a truck passed over his arm. The plaintiff for three months previously had done the same work without any assistance, and without making any objection : —

Held, in an action by the plaintiff against the defendants for compensation for the injury, that the plaintiff having voluntarily undertaken the duty, was not entitled to recover. *Skip v. Eastern Counties Railway Co.* 396.

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3. *Hiring — Time of Service.*] The plaintiff was engaged by the defendants to superintend their smelting works in Spain, by the following letter: "We shall require you to enter into an engagement for at least three years, at our option, at a salary of 250*l.* "We should further require you to visit some of the principal smelting establishments in England, and go out by way of Gibraltar, which is the shortest." The plaintiff commenced visiting the smelting establishments on the 1st February, 1850, and shortly after sailed for Spain, where he served the defendants up to the middle of February, 1851, and was then dismissed by them:—

Held, that this was a contract binding the plaintiff to stay three years, and giving the defendants the option of determining the service at the end of each year, and, therefore, that the defendants having dismissed the plaintiffs after the commencement of a current year, were bound to pay his salary for that year.

Held, also, (Parke B., *dubitante*,) that the service commenced on the 1st of February. *Down v. Pinto*, 503.

Action by Servant.]

See SHIPS AND SHIPPING.

CHARTER.

Of Vessel — Power to Borrow Money.] See SHIPS AND SHIPPING.

MATERIALITY.

See LIFE INSURANCE.

MAXIMS.

Qui ponit folitur, 53.

Sic utere tuo, ut alienum non lædas, 122.

Fictio Juris neminem lædere debet, 442.

MEDICINES.

Supply of, for Ships.]

See SHIPS AND SHIPPING.

MISDIRECTION.

The defendant kept a room which was used as a supper room and place of general refreshment, there being at the end of it a raised platform, on which stood a piano, and where songs were constantly sung. Programmes of the performance were laid about in different parts of the room. The company was respectable, and no money was paid for admission, nor any extra charge made for the articles consumed there. An action having been brought for a penalty under the 25 Geo. 2, c. 36, relating to public dancing, music, &c., the judge directed the jury to say whether the room was used for the purpose of supplying refreshments in the manner of an hotel, the music and singing being incidental merely, or whether it was used principally for musical performances; and ultimately he directed them to consider whether the room was used for both purposes, in which latter case the plaintiff would be entitled to the verdict. The jury found that the room was used for the purposes of an hotel, and found a verdict for the defendant:—

Held, that although the verdict might be against the evidence, there was no misdirection. *Hall v. Green* 507.

Held, also, (*dissentiente* Martin, B.) that it would have been a misdirection in the judge to state that the question was, whether the keeping of the room as an hotel was the principal or secondary object. *Ib.*

See EXCEPTIONS.

MONEY HAD AND RECEIVED.

See ASSUMPSIT.

MONEY PAID.

1. *Recovery back.*] Where an insolvent is adjudged to be discharged as to a particular

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creditor at a future period, and is arrested by that creditor, a payment of part or all of the debt to obtain his discharge from the arrest, is valid, although a fresh security given under the same circumstances would be invalid. *Viner v. Hawkins*, 437.

2. *Quære*, whether money paid under such invalid security can be recovered back? *Ib.*

See CONTRIBUTION.

NECESSARIES.

See HUSBAND AND WIFE.

NEGLIGENCE.

1. *Action for.*] The plaintiff employed the defendants to sell some houses by auction, and to prepare a description of the houses. They describe two of the houses as containing three stories, whereas they contained only two. The purchaser of those two houses compels the plaintiff, under one of the conditions of sale, to make him compensation for the misdescription. The plaintiff brings an action against the defendants, the auctioneers, for the sum he had been compelled to refund to the purchaser:—

Held, that he was entitled to recover it. *Parker v. Farebrother*, 237.

2. *Of Attorney.*] A trader petitioned the Court of Bankruptcy, under the 211th section of 12 & 13 Vict. c. 106; and an order for the official assignee to take possession of his estate, was made under the 213th section. An attorney, having notice of these proceedings, upon an assurance from the defendant, a creditor, that all the creditors of the bankrupt would concur, and being instructed by him, drew a deed of settlement:—

Held, that as such deed might have been operative if all the creditors had concurred, the attorney was right in drawing the deed. *Lewis v. Collard*, 367.

See MANSLAUGHTER. MASTER AND SERVANT. NUISANCE.

NEW TRIAL.

1. *Verdict against Evidence.*] The fact that the verdict is against the evidence is no ground for a new trial in a penal action. *Hall v. Green*, 507.
2. *Surprise — Affidavit.* An affidavit on which to found a motion for a rule *nisi*, on the ground of surprise, should state, not only that the evidence adduced at the trial was unexpected, but that the party on whose behalf the application is made, would have been prepared, had it not been for the surprise, with evidence to contradict the evidence adduced. *Walter v. Brandeis*, 245.
3. *Small Damages.*] A new trial will not be granted on the ground that from the small amount of damages the jury must have come to a compromise, unless, from the circumstance of the case, it is evident that there has been a total refusal on the part of the jurors to discharge their duty, and the verdict is necessarily wholly inconsistent. *Richards v. Rose*, 406.

NON COMPOS.

See LUNATIC.

NONSUIT.

The 8 & 9 Vict. c. 87, s. 117 (Customs Consolidation Act) enacts, that no writ shall be sued out against any officer of the customs or against any person acting under the direction of the Commissioners of her Majesty's Customs for any thing done in the execution of or by reason of his office until a month's notice of action shall have been given, stating the cause of action, &c. The 118th section enacts, that no plaintiff, in any case where an action shall be grounded on any such act done by the defendant, shall be permitted to produce any evidence of the cause of such action, except such as shall be contained in the notice to be given as aforesaid, or shall receive any verdict against such officer or person unless he shall prove on the trial of

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such action that such notice was given; and in default of such proof the defendant in such action shall receive a verdict with costs, as hereinafter mentioned:—

Held, that, upon the trial of an action against an officer of the customs, it is the duty of the judge, unless the facts are admitted, to hear the evidence, and decide whether the defendant did the act complained of honestly believing that his duty called upon him to do it, in which case the provisions as to notice of action would be applicable. *Arnold v. Hamel*, 547.

NUDUM PACTUM.

See CONTRACT.

NUISANCE.

Landlord and Tenant—Sewer.] The defendant had, more than twenty years before the action, constructed a sewer or watercourse through property of his own, and then occupied by him. In 1845, the defendant let a house, shop, and cellar to the plaintiff, which the defendant down to that time also occupied with the property. In 1851, the sewer or watercourse burst, and thereby the plaintiff's cellar and goods were damaged; and the plaintiff thereupon brought an action against the defendant for negligently and improperly making and constructing the sewer, and keeping and continuing the same negligently and improperly made and constructed, and so causing the damage. The jury found that the sewer was not originally constructed with proper care, and it was proved that it had been continued in the same state:—

Held, that upon the letting of the premises to the plaintiff, a duty arose on the part of the defendant to take care that that which was before rightful, did not become wrongful to the plaintiff, because that would be in derogation of the defendant's own demise to the plaintiff; and that upon this ground, as also upon the principle *sic utere tuo ut alienum non lædas*, the action was maintainable. *Alston v. Grant*, 122.

OFFICER.

Liability of.]

See TRESPASS.

ONUS PROBANDI.

As to Alterations.]

See WILL.

PARENT AND CHILD.

See HUSBAND AND WIFE.

PARISHES.

The ancient parish of St. Giles-in-the-Fields was divided (under acts of Anne and Geo. 1 and Geo. 2, for the building, &c., of new churches) into two parishes, St. Giles-in-the-Fields and St. George, Bloomsbury, which were made separate and distinct for all purposes except as to church, highway, and poor-rates; and separate vestrymen were appointed for the new parish. By stat. 11 Geo. 4, and 1 Will. 4, c. 10, for regulating the affairs of the joint parishes of St. Giles and St. George, and of the separate parishes of St. Giles and St. George, the vestry of each parish was to be composed of forty-two persons, (besides the rector and churchwardens,) elected by the vestrymen duly qualified; each vestry was to appoint its own churchwardens and auditors, and make its own church rates, and to manage some other affairs of the separate parish; and the vestrymen of the two parishes were to be the joint vestry of the parishes, and to appoint overseers and directors and other officers to manage the relief of the poor of the joint parish, to make its poor rates, and to exercise other powers relative to the poor, and concerning the parishes jointly. Questions before the joint vestry were to be decided by a majority of the vestrymen present:—

Held, that the parishioners of one of the parishes could not separately adopt the provisions of Sir J. Hobhouse's Act, 1 & 2 Will. 4, c. 60, for the election of their own vestry. *Regina v. Basset*, 193.

PARTNERSHIP.

See JOINT OWNER.

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PART PAYMENT.

See LIMITATIONS.

PARTY WALL.

Mutual right of Support.]

See EASEMENT.

PATENT.

1. *Particulars of Objection.*] Particulars of objections delivered under the 15 & 16 Vict. c. 83, s. 41, by a defendant in an action for an infringement of a patent, must state the place at or in which the invention is alleged to have been used or published prior to the date of the letters-patent, and no evidence of such prior user or publication will be admitted, if the particulars of objection are defective on this point. *Palmer v. Cooper*, 468.

2. *Infringement.*] In an action for infringement of a patent, the court disallowed the following plea: that the plaintiff, having petitioned for letters-patent, represented to the solicitor-general, to whom the matter was referred, that the invention consisted of matters mentioned in a paper writing exhibited to the solicitor-general, (setting it forth,) who, confiding therein, reported that the letters-patent might be granted; that, after the grant of the letters-patent, the plaintiff enrolled his specification in certain terms, and falsely described his invention therein; and that so much of the invention as was stated in the specification, was not part of the invention in the paper writing and letters-patent mentioned, and was not part of the invention for which the letters-patent were granted. *Hancock v. Noyes*, 510.

See ESTOPPEL.

PAUPER.

Charges to Union Fund.] An extra-parochial place was, by the 5 & 6 Vict. c. 48, made liable to maintain its own poor, and afterwards comprised in W. Union. Certain paupers had lived all their lives in that place, and, as far as was known, neither they nor their ancestors had any settlement elsewhere:—

Held, that, as these paupers were irremovable, because there was no place to which they could be removed, and not by reason of the 9 & 10 Vict. c. 66, the charges of relief must be borne by the place itself, and was not cast on the common fund of the union, by the 11 & 12 Vict. c. 110, s. 3. *Regina v. The Overseers of East Dean*, 103.

1. *No Settlement.*] The 9 & 10 Vict. c. 66, extends only to render irremovable such paupers as have a known settlement to which they would be liable to be removed independently of the provisions of that act; and the 11 & 12 Vict. c. 110, s. 3, casts upon the common fund of the union the cost of relief of such paupers only. *Regina v. Bennett*, 143.

2. Therefore, where paupers who had resided for upwards of five years in a place which was formerly extra-parochial, but was in 1842 made a township by act of parliament, and included in an union, and had acquired no settlement in that township or elsewhere, became chargeable thereto, the cost of their relief was not properly charged on the common fund of the union. *Ib.*

PAUPER LUNATIC.

1. *Seizing his Effects.*] Under stat. 3 & 4 Vict. c. 54, s. 2, which, for the repayment to parishes or counties of expenses incurred in the maintenance, &c., of criminal lunatics, enables justices to order the overseers of any parish where money, goods, or chattels, of the lunatic shall be, to seize the money, or seize and sell the goods and chattels, justices cannot authorize the overseers to levy a debt claimed as due to the lunatic, by ordering them to seize a sum of money in the possession of the alleged debtor. *Regina v. Longhorn*, 175.

2. *Mandamus.*] And, on motion for a mandamus, at the instance of such overseers,

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calling upon the alleged debtor to pay them such money, the prosecutors adducing evidence to show that such debt was due, and that the sum demanded was in possession of the alleged debtor, the court, on cause shown, refused a mandamus. *Id.*

PAYMENT.

1. *Evidence — Estoppel.*] In an action for goods sold, there was a plea of payment, and it appeared that both the plaintiff and the defendant employed G. as factor. G. sold the goods to the defendant knowing he was factor. On a balance of accounts G. was indebted to the defendant. The plaintiff, who knew the state of accounts between G. and the defendant, petitioned the Court of Bankruptcy to make G. bankrupt, and alleged in his affidavit that G. owed him a sum of money for goods sold by G. as factor of the plaintiff, to the defendant, and for which he had received payment by means of goods sold by the defendant to G. The plaintiff having afterwards sued the defendant for the price of the goods: —

Held, that the statement in the affidavit was not conclusive evidence estopping the plaintiff from denying that the defendant had paid for the goods; the allegation as to payment, so explained, not being an allegation of fact, but of an inference of law drawn by the plaintiff. *Morgan v. Couchman*, 321.

2. *Of Part — When a Discharge.*] To a declaration for work and labor, the defendant pleaded, that after the present cause of action, and before suit, the plaintiff levied a plaint against the defendant in the county court for 50*l.*, that the defendant being then and at the time of the accruing of the cause of action for which the plaint was levied, an infant, gave notice that he should defend himself against the plaint on that ground, and that before trial in the county court, the plaintiff and defendant agreed that the defendant should pay the plaintiff's costs and 30*l.*, and that the plaintiff should accept the 30*l.* and the performance by the defendant of the agreement in satisfaction as well of the cause of action for which the plaint was levied, as of all causes of action which the plaintiff then had against the defendant. Averment of payment before suit by the defendant of the 30*l.* and costs, and acceptance by the plaintiff in pursuance of the agreement: —

Held, that the averment of the defendant being an infant when the cause of action arose for which the plaint was levied, was immaterial, and that the plea was a good defence without that averment. *Cooper v. Parker*, 325.

See LIMITATIONS.

PAYMENT INTO COURT.

See AMENDMENT. BOND.

PENAL ACTION.

See NEW TRIAL.

PIRATES

Loss by.]

See INSURANCE.

PLEADING.

1. *Action on Judgment.*] To an action on an Irish judgment, the defendants, who were a corporation, pleaded that they were not served with process in the action, and that "the plaintiff irregularly, behind the back of the defendants, caused an appearance to be entered for the defendants," and thereby obtained judgment, when the defendants were not within the jurisdiction of the court, and had not been served with any process to appear in the action: —

Held, a bad plea, after the plaintiff had pleaded over to it, for not showing that the defendants did not know of the summons, or that they did not appear in the action. *Sheehy v. Life Insurance Co.* 268.

2. *Quære*, if the 13 & 14 Vict. c. 18, s. 9, which provides for substitution of service in actions brought in Ireland, applies to corporations? *Id.*

3. *Replication.*] Matter which before the statute 15 & 16 Vict. c. 76, ss. 77, 79, was the subject of a special replication, is not put in issue by the general traverse given

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by these sections. Trespass q. c. f., plea justifying under a right to dig soil. Repliation, — “And the plaintiff joins issue on the plea”: —

Held, that the right only was put in issue, and that trespasses, extra the right, should have been new assigned. *Glover v. Dixon*, 490.

See FRAUD. PAYMENT. TRESPASS.

POOR RATES.

Russell Institution.] The Russell Institution comprises a library, theatre or lecture-room, and a news-room, and was founded in 1808 for the purpose of, first, the formation of a library consisting of the most useful works in ancient and modern literature; secondly, the establishment of a reading-room provided with the best foreign and English journals and other periodical publications; thirdly, for lectures on literary and scientific subjects. The funds for purchasing the building and supporting the institution were raised in the first instance by transferable shares. Persons might become annual subscribers to the institution and be entitled to the privileges of proprietors. There were about 400 shareholders and subscribers, and the privileges of the institution, except as to admission to the lectures, were confined to them. The library contained about 18,000 volumes and the principal reviews, magazines, daily and weekly papers, and other periodicals, and directories and other books of reference, and the mining and railway journals, and railway time-tables. Some of the newspapers taken in were filed, and the rest sold for the benefit of the institution. The lectures on subjects connected with science, literature, and the arts, the public were invited to attend upon payment of an admission fee. The whole income of the institution, derived in part from the rent of baths, wine-cellars, and annual subscriptions, was applied in defraying the expenses of the institution, and a rule of the institution provided that no dividend, gift, division or bonus in money or otherwise could be made to or between the members: —

Held, that the institution could not be considered as “a society instituted for the purposes of science, literature, or the fine arts exclusively,” and was therefore liable to parochial rates.

Quære. Whether it could be considered as “a society supported in part by annual voluntary contributions,” within the meaning of 6 & 7 Vict. c. 30, s. 1. *Russell Institution v. St. Giles*, 126.

PRACTICE.

1. The court directed a special case to be set down for argument, which was signed by the plaintiff, (who intended to argue it in person,) and by counsel for the defendants. *Udney v. East India Co.* 227.

2. *Pleading and Demurring.*] Where a party has obtained a judge's order for leave to traverse and demur to a pleading under the 80th section of the Common Law Procedure Act, 1852, and judgment has been given against him on the demurrer, the court will not rescind the order as to the traverse and strike it out. *Sheehy v. Professional Life Assurance Co.* 274.

3. *New Trial.*] The plaintiff, on the 24th of March, gave notice of trial for the first sittings for London in Easter term, and on the 20th of April, gave notice of his intention to enter and try the cause as undefended at the second sittings. The defendant accordingly did not appear at the first sittings on the 22d of April, when the cause was tried, and a verdict found for the plaintiff. The defendant, on the 6th of May, moved for a rule to set aside the proceedings for irregularity: —

Held, that he ought to have moved within four days from the day of trial. *Ellaby v. Moore*, 280.

4. *Judge's Order.*] In an action of trover, by churchwardens, to recover a parish book, Erle, J., to whom the cause was referred after verdict, by consent of the parties, made an order, which was made a rule of court, that the costs of both sides should be paid by the parish. The cause came on for trial a second time, when, by like consent, it and all matters relating to it were, by order of Nisi Prius, which was made a rule of court, referred to Williams, J., to direct in what manner the order of Erle, J., was to be carried into effect. Williams, J., on the 10th of August, 1852, made an order upon the defendants to pay the plaintiffs their costs on the 1st of

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- March, 1853, "unless in the mean time the sum be paid to the plaintiffs out of the parish funds." This order was made a rule of court in Michaelmas term, 1852, and the defendants not having paid the money on the 1st of March, 1853, execution was issued against them : —
- Held*, first, that the order of the 10th of August was a judge's order, and not an award, and that Williams, J., had not exceeded his authority in making it. *Gibbs v. Fyfe*, 285.
5. 1 & 2 Vict. c. 110.] Secondly, that the order being conditional, was not an "order to pay money," within the meaning of the 1 & 2 Vict. c. 110, upon which execution could issue. *Ib.*
6. *New Trial*.] Where counsel at a trial does not ask that a certain point should be submitted to the jury, but gets leave to move reserved, he cannot afterwards ask for a new trial, on the ground that that point was not submitted to the jury. *Morgan v. Couchman*, 321.
7. *Consolidatory Action*.] Where eight passengers in a ship signed a round robin, and employed the same attorney to bring separate actions against the owners, for damages arising out of a breach of contract for the passage, whereby the plaintiffs suffered in their health, the court refused a rule to stay proceedings in seven of the actions till one should be tried, although the defendants offered to undertake not to defend the others, if there should be a verdict found against them on such trial. *Westbrook v. Australian Royal Mail Co.* 327.
8. *Change of Venue*.] A plaintiff cannot change the venue upon a common affidavit, after obtaining time to plead upon the terms of taking short notice of trial. *Cleke v. Bradley*, 357.
9. *Writ of Trial*.] The defendant having obtained time to plead, taking short notice of trial, if necessary, before the sheriff, delivered two pleas on the 5th of August, whereupon the defendant on the 10th delivered a replication joining issue on the pleas, and on the following day delivered the issue with notice of trial in order to try the issue before the sheriff on the 18th. The defendant having returned the issue and notice of trial, and the cause having been tried in his absence, it was objected that the plaintiff was not entitled to give short notice of trial; and that the word "issue" had been improperly used for "issues" : —
- Held*, that the writ of trial was good. *Flowers v. Welch*, 409.
10. *Declaration*.] A plaintiff who files a declaration within one year after the process is returnable, is to be deemed out of court, within the Reg. Gen. Hil. term, pl. 21, unless he also serves notice of declaration within the same period. *Eaton v. Roberts*, 413.
11. *Appearance*.] On the 13th of April, 1852, the plaintiff issued his writ of summons. On the 24th of October, the Common Law Procedure Act came into operation. On the 13th of November the plaintiff entered an appearance for the defendant *sec. stat.* and filed a declaration, and on the 12th of November, 1853, gave notice of declaration : —
- Held*, that the appearance *sec. stat.* was good, and that the declaration ought to be set aside. *Ib.*
12. 15 & 16 Vict. c. 76.] By the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 27, in case of the non-appearance of the defendant where the writ of summons is indorsed in the special form therein provided, the plaintiff is enabled, on filing a judge's order for leave to proceed under the provisions of the act, and a copy of the writ of summons, at once to sign final judgment in the form contained in the schedule to the act. And by the same section it is enacted, that "it shall be lawful for the court or judge, either before or after final judgment, to let in the defendant to defend upon an application supported by satisfactory affidavits accounting for the non-appearance, and disclosing a defence upon the merits" : —
- Held*, that an application to rescind the judge's order may be made on affidavits contradicting those upon which the order was obtained, without disclosing a defence upon the merits. *Hall v. Scotson*, 473.
- Quare*, whether, if the order stands, the judgment signed in pursuance of it can be set aside without such affidavits as are mentioned in the statute. *Ib.*

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Quere, whether the words of the 27th section, being affirmative, take away the general power of the court over its judgments, or are merely cumulative. *Id.*

13. *Insolvent.*] Where a defendant, who was in prison, had stated that he intended to go through the Insolvent Court, and that he had made up his mind not to pay anybody, and afterwards, pursuant to the Common Law Procedure Act, 15 & 16 Vict. c. 76, s. 101, served the plaintiff with a twenty days' notice to bring the cause on for trial, the court set aside the notice. *Truscott v. Lantow*, 487.

14. *Court of Appeal.*] Where it is the practice of the court below to admit *rèféc* evidence, the court of appeal will proceed upon that evidence as contained in the judge's notes, and not direct the proceedings to commence *de novo*. *Williams v. Williams*, 607.

See AMENDMENT. ATTORNEY.

PRINCIPAL AND AGENT.

Liability of Agent.] *Semble*, that an agent who sells goods for a foreign principal, is responsible for a breach of contract by his principal in not delivering them. *Peterson v. Ayre*, 382.

See MASTER AND SERVANT.

Agent bound, if he had no Authority.] See BILL OF EXCHANGE.

See SALE.

PRINCIPAL AND FACTOR.

See PAYMENT.

PRINCIPAL AND SURETY.

1. *Suppressio Veri.*] In an action against the surety on a bond conditioned for the faithful discharge of the duties of a relieving officer, the defendant pleaded and proved that at the time of the execution of the bond there was a balance of 206*l.* due from the principal, in respect of money which had been received by him as receiving officer, and that that fact was not communicated to him :—

Held, that, as the existence of that balance did not necessarily involve any imputation of misconduct against the relieving officer, it was not a material fact which the guardians were bound to communicate to the surety before he executed the bond. *Guardians, &c. v. Strother*, 183.

2. *Liability of Surety.*] Two railway companies were amalgamated by an act of parliament, which contained, *inter alia*, a clause that "from and immediately after, &c., all the moneys, goods, chattels, steam and other engines, carriages, wagons, trucks, machines, live and dead stock, shares, bonds, deeds, securities, books, writings, maps, plans, and other personal estate and effects of or to which the dissolved companies, or either of them, were possessed or entitled at law or in equity immediately before the granting thereof, shall be vested in and belong to the new company for their absolute benefit; and all persons and corporations who, immediately before the granting of such certificate, owed any sum of money to the dissolved companies, or either of them, or to any person on behalf of the dissolved companies or either of them, shall, after the granting thereof, pay the same, together with all interest, if any, due, or to accrue due for the same, to the new company; and all the rights and remedies for enforcing payment thereof, which before the granting of such certificate belonged to the dissolved companies, or either of them, shall, immediately after the granting thereof, devolve upon and be vested in the new company; and all moneys which, immediately before the granting of such certificate, were due and owing by or recoverable from the dissolved companies or either of them, or for the payment of which they, or either of them, were or but for the granting of such certificate would have been liable, shall be paid, with all interest, if any, due, and to accrue due thereon, by or be recoverable from the new company; and all conveyances, contracts, agreements, mortgages, bonds, covenants, and securities made or entered into before the granting of such certificate, to, with, in favor of, or by or for the dissolved companies, or either of them, or any person

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duly authorized on their behalf, shall, immediately after the granting of such certificate, be and remain as good, valid, and effectual, in favor of, and against, and with reference to the new company, and may be proceeded on and enforced in the same manner to all intents and purposes, as if the last-mentioned company had been a party to and executed the same, or had been named or referred to therein, instead of the persons, company, or party actually named therein respectively." Before the amalgamation, A had become security by bond to one of the companies for the conduct of B, whom they had taken into their employ. B having continued in the service of the amalgamated company:—

Held, that A was liable to them for breaches of the bond committed after the amalgamation. *Eastern Union Railway Co. v. Cochrane*, 495.

PRODUCTION OF DOCUMENTS.

See ATTORNEY.

PRIVILEGED COMMUNICATION.

See SLANDER.

PRIVILEGE.

Of Attorney and Client.]

See ATTORNEY.

PROFITS.

Loss of—Not an Element of Damage.] See DAMAGES.

PROMISSORY NOTE.

When a Payment.] See LIMITATIONS. BILL OF EXCHANGE.

PROVISO.

Effect of in a Covenant.] See HUSBAND AND WIFE.

PUBLIC HEALTH ACT.

1. *Penalty.*] The defendant, being one of the proprietors of a public company, and also a member of the local board of health, voted upon a question concerning the company. An action was brought for the recovery of the penalty imposed by the 13th section of the Public Health Act, 11 & 12 Vict. c. 63, s. 19, upon any person voting after being disabled. The plaintiff in the action was a rate-payer of the town:—

Held, that he was not a "party grieved" within the 13th section, and was not entitled to sue. *Boyce v. Higgins*, 855.

2. *Quære*, whether the defendant was a person disabled within the meaning of the 19th section. *Ib.*

RAILWAYS.

Ant of Damages.] An adjudication by two justices, under the Lands Clauses Act, 1845, and Railways Clauses Consolidation Act, 1845, of the sum (£L) to be paid by a railway company as compensation to a party whose land has been injuriously affected by the exercise of their statutory powers, is an order in thin stat. 11 & 12 Vict. c. 43, s. 1, and is bad, under sect. 11, if the compensation which the order is founded be made more than six calendar months after the date of complaint arose. *Edmundson, in re*, 169.

ri.] Such order may be brought up by *certiorari*, to be quashed. *Ib.*

Order — Evidence.] An affidavit in support of an application under the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 16, for a *scire facias* for execution against a shareholder on a judgment against a railway company, stated that the deponent, having been foiled in his attempts to obtain a sight of the register, and so as to obtain authentic and official information on the subject, deponent instituted inquiries as to who really were the shareholders of the company, and hath been informed by parties officially connected with the said railway, and which in-

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formation deponent verily believes to be true, that the said J. F. F., who has been a director of the said company from the commencement, was a duly registered shareholder of seventy shares in the said company, and that 1,085*l.* was due thereon in respect of subscriptions not called up, the shares in the said company being 20*l.* shares, and only 4*l.* 10*s.* per share having been paid up or called:—

Held, that this affidavit unanswerd was good *prima facie* evidence of the party being a shareholder of the company. *Rastrick v. Derbyshire Railway Co.* 405.

4. *Trespass — Directly Across.*] The European and American Electric Printing Telegraph Company's Act, 14 & 15 Vict. c. 135, s. 37, provides that the company may lay down and place their pipes, &c., under any public roads, streets, and highways, and along or across such places for the purpose of the telegraph, and break up the pavement or soil for that purpose; but that nothing in this provision contained shall extend to any railway or canal, except that it shall be lawful for the company to carry their wires, pipes, &c., "directly, but not otherwise, across any railway or canal. The South-Eastern Railway Company, in pursuance of the provisions of their act, had carried their railway on a level across a part of the public highway in the city of Canterbury, the public having the full use of the highway, except when the trains were passing:—

Held, that the highway was not a highway within the meaning of the European and American Electric Printing Telegraph Company's Act, and that it was an act of trespass to dig and bore under the railway for the purpose of carrying the telegraph under the spot where the railway crossed the highway. *South-Eastern Railway Co. v. European Telegraph Co.* 513.

Amalgamation of.] See SURETY. CALLS. MASTER AND SERVANT.

RECOVERY BACK.

Of Money Paid.]

See MONEY PAID.

REPAIRS.

See COVENANT.

RESPONDEAT SUPERIOR.

See MASTER AND SERVANT.

SALE.

Agent — Stoppage in Transitu.] A. & Co., merchants at Londonderry, had instructed their correspondent, S. A., a merchant in London, to purchase corn on their account. S. A. purchased a cargo of Indian corn, and sent a contract note to the vendors, R. & Co., which stated that the cargo was "sold by order and for account of R. & Co. to our principals, shipped per *Cleopatra*, at the price of 24*s.* 6*d.* per quarter." The entry of the sale in the books of R. & Co. made S. A. "debtor to the cargo of Indian corn;" and they sent to S. A., the charter-party, the bill of lading duly indorsed, an invoice, and an order directing the captain to act upon the instructions of S. A. In the invoice S. A. was made the purchaser of the cargo. On the day of the purchase S. A. wrote to A. & Co., advising them of "having purchased for your account the cargo at 24*s.* 9*d.*" and inclosing the bill of lading and other documents received from R. & Co., and also S. A.'s draft for 1,525*l.* 16*s.* 3*d.* at three months, and an invoice signed by S. A., and stating that the cargo was "bought by order and for account and risk of A. & Co." at 24*s.* 9*d.* per quarter. S. A. afterwards wrote requesting the draft to be made payable at a banker's, as it "facilitates our discounting the bill. The draft was returned to S. A. accepted. S. A., before the bill was due, became bankrupt, and R. & Co. thereupon stopped the cargo *in transitu*, not having received payment for it "on account (as they stated) of the bankruptcy of the cargo buyer." A. & Co. then wrote to R. & Co., stating that S. A., "from whom we bought the cargo," had informed them of its being stopped, and stating that they would then take up their acceptance, upon the cargo being allowed to proceed. A. & Co. afterwards paid to R. & Co. the amount of the cargo (1,472*l.* 3*s.*) as invoiced by R. & Co. to S. A. upon being indemnified by R. & Co., and the cargo was allowed to proceed as ordered by A. & Co.:—

Held, in an action by the assignees of S. A. to recover the amount of A. & Co.'s ac-

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ceptance, that the documents in this case showed that S. A. was the purchaser of the corn from R. & Co. and the seller of it to A. & Co., and not merely an agent; that, therefore, R. & Co. had not at the time the right of stoppage *in transitu*; and that the assignees were entitled to recover in the action. *Pennell v. Alexander*, 132.

See ASSUMPSIT. TROVER. WARRANTY.

SALVAGE.

Tender — Costs.] From the evidence in a cause of salvage it appeared that before a tender of 30*l.* was made, the salvors had refused an offer of 80*l.* for their services. The court, awarding 50*l.*, and overruling the tender, gave no costs. *The Hedwig*, 582.

Action for.]

See ACTION.

SEAWORTHINESS.

See INSURANCE.

SECONDARY EVIDENCE.

See EVIDENCE.

SEPARATION.

Between Husband and Wife.] See HUSBAND AND WIFE.

SET-OFF.

1. *Action for Unliquidated Damages.*] Declaration on a valued policy of marine insurance, underwritten by the defendant for 100*l.*, on goods from D. to L., alleging a partial loss above 5*l.* per cent., and a breach of the policy by reason of the defendant's nonpayment of the loss, or any part thereof, or of the 100*l.*, or a proportional, or any part thereof. Plea, that before action, the proportional sum which the defendant was liable to pay in respect of the loss, was, by agreement between the plaintiff and the defendant, adjusted at a certain rate per cent., and thereby then liquidated and ascertained to be a certain sum, against which the defendant is willing to set off a larger sum due to him from the plaintiff for premiums of insurance:—

Held, on demurrer, to be a bad plea; that the action was for unliquidated damages, and that the adjustment did not make them liquidated, but was only evidence for a jury of the amount of damages. *Luckie v. Bushby*, 256.

2. *Pleading.*] Where to a plea of set-off the plaintiff replies that he is not indebted as in the plea alleged, he may under this replication avail himself of the objection that the debt is due not from himself alone, but from a third party jointly with him. *Arnold v. Bainbrigge*, 451.

SEWER.

See NUISANCE.

SHERIFF.

Trespass against.]

See TRESPASS.

SHIPS AND SHIPPING.

1. *Seaworthiness — Warranty of.*] There is no implied obligation on the part of the owner of a ship towards a seaman who had agreed to serve on board of her, that the ship shall be in a fit state to perform the voyage; and in the absence of any express warranty to that effect, or any knowledge of the defect, or any personal blame on the part of the ship-owner, the seaman cannot maintain an action by reason of the ship becoming leaky, and of his being obliged to undergo extra labor. *Couch v. Steel*, 77.

2. *Supply of Medicines.*] The 7 & 8 Vict. c. 112, s. 18, requires that every ship navigating between the United Kingdom and any place out of the same, shall keep constantly on board a sufficient supply of medicines suitable to accidents and diseases

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arising on sea voyages, and in case any default be made in keeping such medicines, the owner of a ship is made liable to a penalty, which by section 62 is recoverable at the suit of any person, and is to be applied in part to the informer, and the residue to the Seamen's Hospital Society:—

Held, that the penalty was recoverable for a breach of the public duty, created by the statute, and that the provisions of the statute did not interfere with the common-law right of a seaman serving on board the vessel to maintain an action in respect of a special damage resulting to him from the breach of the duty. *Ib.*

3. *Power of Master to borrow Money.*] In an action for money lent, it appeared that the defendant, residing at Exeter, was owner of a ship, and that P., the master, being wind-bound in a river, at the distance of one day's post from Exeter, borrowed 5*l.* of the plaintiff, to buy provisions. The master was called as a witness, but was not asked whether he could have got the goods on the owner's credit:—

Held, that the jury were justified in inferring that there was such necessity for borrowing the 5*l.*, as to make the defendant liable. *Edwards v. Havell*, 303.

4. *Collision — Costs.*] In a collision, where the court, assisted by Trinity Masters, decided that both vessels were to blame, but that with respect to one of them the blame was to be attributed to the pilot, who had been taken on board under a local (Liverpool) Pilot Act:—

Held, that such vessel was not to contribute to the loss; and with respect to costs, that each party must pay his own costs. *The Montreal*, 580.

5. *Damage Cause.*] The claim made in a damage cause was 3,121*l.* The report allowed 1,736*l.* A tender was made before the reference of 1,685*l.* The four principal items disallowed amounted to 1,109*l.* Claimants condemned in the costs of the reference as to these four items. *The Nimrod*, 589.

See ACTION. EVIDENCE. INSURANCE. SET-OFF.

Contract to build a Ship.]

See TROVER.

SLANDER.

1. *Privileged Communication.*] The plaintiff, the secretary of a company called the Brewers' Insurance Company, being charged with misconduct, was called upon to attend a board of directors for the purpose of explanation, but declined to do so, whereupon the directors, after hearing the nature of the charges, passed a resolution declaring him to have been guilty of gross misconduct, and dismissing him from their service. The defendant, who was a director of that company, and also of another company called the London Necropolis Company, communicated the fact of the plaintiff's dismissal from the service of the former company, "for gross misconduct," at a board meeting of the latter company, and proposed a resolution to dismiss him from his employment as their auditor, and, in answer to an inquiry from the chairman, said that the misconduct consisted in "obtaining money from the solicitors of the company under false pretences, and paying a debt of his own with it;" and, upon the plaintiff's appearing on a subsequent day with his attorney before the board, to meet the charges against him, the defendant refused to go into them. In an action of slander:—

Held, that the communication was privileged, and that the defendant's refusal to go into the charges in the presence of the plaintiff and his attorney, was no evidence of malice that could properly be submitted to the jury; for that such refusal being consistent with *bona fides*, *bona fides* was to be presumed until the contrary was proved. *Harris v. Thompson*, 370.

2. *Clergyman.*] A declaration for slander by charging a clergyman in holy orders with incontinency, is bad, without showing actual damage, or that he holds some office or employment producing temporal profit. *Gallwey v. Marshall*, 463.

3. The 61st section of the Common Law Procedure Act does not remedy such an omission. *Ib.*

STAMP.

See EJECTMENT.

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STATUTES CITED, EXPLAINED, &c.

29 Ch. 2, c. 7, (Sunday Act.)	151
25 Geo. 2, c. 36, (Musical Performance — License.)	140
41 Geo. 3, c. 109, s. 4, (General Inclosure Act.)	428
43 Geo. 3, (Inclosure Act.)	428
7 & 8 Geo. 4, c. 29, s. 75, (The Larceny Act.)	213
9 Geo. 4, c. 14, (Limitations.)	92, 429
3 & 4 Will. 4, c. 27, s. 2,	428
5 & 6 Will. 4, c. 76, s. 92, (Municipal Corporations Act.)	242
6 & 7 Will. 4, c. 71, (Tithe Commutation Act.)	423
1 Vict. c. 26, s. 1, (Statute of Wills.)	53
3 & 4 Vict. c. 24, (Costs.)	233
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6 & 7 Vict. c. 36, s. 1, (Poor Rates.)	126
7 & 8 Vict. c. 112, s. 18, (Ship Medicines.)	77
7 & 8 Geo. 4, c. 30, s. 41, (Malicious Trespass Act.)	213
7 & 8 Vict. c. 59,	170
8 & 9 Vict. c. 38,	170
8 & 9 Vict. c. 126, s. 17,	294
8 & 9 Vict. c. 89, s. 14, (Ship Registry Act.)	220
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11 & 12 Vict. c. 63, s. 19, (Public Health Act.)	355
12 & 13 Vict. c. 116, s. 125, (Bankruptcy.)	333
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15 & 16 Vict. c. 76, s. 77 & 79,	491
15 & 16 Vict. c. 76, s. 101,	488
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STAYING PROCEEDINGS.

See HUSBAND AND WIFE.

STOPPAGE IN TRANSITU.

See SALE.

SUNDAY.

Arrest On.]

See ARREST.

SUPPRESSIO VERI.

See PRINCIPAL AND SURETY.

SURETY.

See PRINCIPAL AND SURETY.

SURPRISE.

See NEW TRIAL.

TELEGRAPH.

See RAILWAY.

TENANTS IN COMMON.

See JOINT OWNER.

Common Law.

TENDER.

See SALVAGE.

TIME.

1. *Computation of.*] A fraction of a day cannot be taken into account, where the conflict is between the right of the crown and the right of the subject. *Regina v. Edwards*, 440.
2. Therefore, where an adjudication of bankruptcy and the appointment of an official assignee took place in the morning, and at a subsequent period of the day an extent issued against the bankrupt: —
Held, per Pollock, C. B., Parke, B., and Platt, B., that the bankrupt's property might be taken under the extent. Per Martin, B.—The priority of events happening on the same day, may be inquired into between the crown and the subject, just as between subject and subject. *Ib.*

TIME POLICY.

See INSURANCE.

TITHES.

1. *Right to.*] Debt for not setting out tithes. The plaintiff was originally lay impropriator of the tithes of certain fen lands in the parish of M., which were from 1816 down to the time of the action occupied by the defendant. An act for inclosing lands in the parish of M., gave an option to the Inclosure Commissioners, to make an allotment to the impropriator in lieu of these tithes. By their award, made in 1812, they stated that they had procured to be made an accurate survey and plan of the waste lands to be inclosed, and of the ancient inclosed lands, (except the fen lands,) and then proceeded to allot to the impropriator certain allotments in lieu of and as a compensation for all the tithes growing and renewing within M., and due unto him. A schedule and also a map or plan were annexed to the award, but neither comprised the defendant's lands, or the fen lands. From 1816 to 1828 the defendant had paid no tithes to the plaintiff in respect of his land, but for a period of twenty years from 1828 the defendant had either paid tithes in kind, or compounded for them to the plaintiff. In 1841, on an Assistant Tithe Commissioner being sent down with a view of awarding a sum to be paid as a commutation of the tithes of the parish of M., the defendant claimed that his lands were exempt from tithes by virtue of the Inclosure Act and award; but the Tithe Commissioner denied that his lands were not thereby exempted:—
Held, that the perception of the tithes for twenty years, gave the plaintiff no title to them under the statute 3 & 4 Will. 4, c. 27. *Bunbury v. Fuller*, 425.
2. *Decision of Commissioner.*] *Held*, secondly, that the decision of the Assistant Tithe Commissioner, was not conclusive against the exception, since s. 90 of the Tithe Commutation Act, the 6 & 7 Will. 4, c. 71, took away his jurisdiction, if the tithes had been extinguished by virtue of the Inclosure Act, and that he could not give himself jurisdiction by deciding that they were not so extinguished. *Ib.*
3. *Award.*] *Held*, lastly, that though the award professed to give the allotment in lieu of all the tithes in M., yet as the commissioners had an option whether they would extinguish all the tithes, and as there was evidence on the face of the award, maps, and surveys, that the fen lands were not taken into consideration, it was a question for the jury whether the award in reality awarded any compensation to the plaintiff for the tithes on the defendant's land. *Ib.*

TRESPASS.

1. *Against an Officer.*] The assistance of a sheriff's officer, for the purpose of executing a writ of *fi. fa.*, illegally entered the plaintiff's premises on a Sunday, by break-

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- ing open a window. They afterwards, by the officer's direction, abandoned possession on Monday following. On the Thursday after, the officer himself entered the same premises to execute a distress warrant : —
Held, that he was not debarred by the act of his assistants from selling the goods when seized on the second occasion. *Percival v. Stamp*, 399.
2. *Illegal Entry.*] *Quære*, whether the officer would have been liable, if the illegal entry of his assistants on the Sunday had facilitated his own entry on the Thursday, and he had availed himself of such illegal entry. *Ib.*
3. *Pleading.*] The declaration stated that the defendant, on the 6th of March, 1853, broke and entered the dwelling-house and premises of the plaintiff, and continued and remained therein a long space of time, to wit, eight days : —
Held, that evidence was admissible of an entry on the day first named, and also on a subsequent day, although the defendant had, after the first entry, left the premises without intending to return. *Ib.*

TROVER.

1. *Property in Plaintiffs.*] On a contract for building a ship, it is a question of intention to be inferred from the circumstances whether the property passes before the completion of the ship or not. *Read v. Fairbanks*, 220.
2. *Bill of Sale.*] The plaintiffs contracted with R. to build a ship for them, and made advances from time to time in respect of her; and R. gave them, as a security for the advances, a bill of sale of the ship, which stated that he, R., thereby did sell, transfer, &c., to the plaintiffs a certain ship in progress of building, (describing her,) to have and to hold the ship, &c., to the plaintiffs forever, when she should be completed : —
Held, that the present property passed to the plaintiffs by the bill of sale, and that the vesting of it was not postponed by the *habendum* to the time when the vessel should be complete. *Ib.*
3. The defendants having converted the vessel before she was finished, and having finished her, the plaintiffs were
Held entitled to recover, as damages in trover, the value of the vessel at the time of her conversion, but not her value at a subsequent time, nor, as a special damage, the value of freight which the plaintiffs might have earned with her, if R. had completed her, and delivered her to them. *Ib.*
4. *Damages.*] And, per Jervis, C. J., *semble*, that a proper way to estimate the value of the vessel at the time of the conversion would be to ascertain her value at the place where she was built, when completed according to the original contract, and to deduct therefrom the amount which it would have been necessary to lay out after the conversion, in order to complete her according to the contract. *Ib.*
5. *Registry Act.* *Quære*, as to the effect of a certificate under the Registry Act, 8 & 9 Vict. c. 89, s. 11, on the property in a vessel built in British possessions abroad. *Ib.*
- Defendant may show Title in Third Party.*] See INTERPLEADER.

See JOINT OWNER.

UNDUE INFLUENCE.

See *Greville v. Tylee*, 53.

USAGE.

Evidence of.]

See EVIDENCE. INSURANCE.

See *Orme v. Galloway*, 521. *Metzner v. Bolton*, 537.

USE AND OCCUPATION.

See LANDLORD AND TENANT.

Common Law.

UTTERING.

See FORGERY.

VARIANCE.

See CONTRACT.

VENDOR AND PURCHASER.

Conditions.] T. being possessed of a plot of land for a term of years, by indenture dated the 24th of April, 1845, mortgaged the term to S., as a security for 300*l.*, with an absolute power of sale on default of payment. On the same day he executed a memorandum of agreement, by which he undertook to deposit with S. a lease of another plot of ground when it should be executed, the draft of which was already prepared, as a further and collateral security for the sum secured by the mortgage. A mill and certain buildings occupied therewith, stood partly on one plot of land and partly on the other. On the 18th of December, 1848, the lease was granted to T., and then deposited with S., in accordance with the memorandum of agreement. By indenture of the 27th of August, 1845, T. executed a second mortgage of the term mortgaged to S., as security to H. M. for 100*l.* On the 2d of March, 1847, T. assigned an undivided moiety of the premises comprised in the lease first mentioned, and of those comprised in the lease of the 18th of December, 1845, and of the mill and buildings thereon to A.; and on the 20th of September, 1847, assigned all his estate and effects to trustees for his creditors. By indenture of the 31st of August, 1848, S. and H. M. assigned to the defendant both plots of land, with the mill and buildings thereon, subject to such equity of redemption as was then existing. In April, 1852, the defendant sold the premises by auction, the conditions stating that he sold the whole as mortgagee of T.; but that as to the part comprised in the lease of the 18th of December, 1845, he had only the equitable interest, and the legal estate was not vested in him, and that the purchaser should accept as to this part such title as the vendor was able to deduce and convey. The plaintiffs purchased both plots and paid the deposit thereon; but on the abstract of title being furnished, and T. refusing to join in the conveyance, they declined to complete, on the ground that the legal estate in the premises comprised in the lease of the 18th of December, 1845, was outstanding, and might be set up adversely to them. They then brought an action for the deposit:—

Held, that they were not entitled to recover as upon a failure of consideration, for that under the circumstances there was the same absolute power of sale as to the premises comprised in both leases, the deposit having been upon the same terms as the mortgage; and that even if this were not so, the conditions of sale had been complied with, the defendant having expressly stipulated to sell an equitable interest only. *Ashworth v. Mounsey*, 457.

VENUE.

Change of.]

See PRACTICE.

VERDICT.

Setting aside.] Where it is clear that one side or the other has committed perjury, the court will not disturb the finding of the jury. *Solomon v. Todd*, 366.

Against Evidence.]

See NEW TRIAL.

VOLUNTARY PAYMENT.

See MONEY PAID.

VOTER.

Forty-Shilling Freehold.] The appellant claimed to vote in respect of a freehold which he let for 40*s.* a year, he agreeing to pay the usual tenant's rates. If he had not so agreed, he could only have obtained 40*s.*, minus the amount of those rates:—

Held, that the appellant had not an estate of the clear yearly value of 40*s.*, and therefore that he was not entitled to vote. *Moorhouse v. Gilbertson*, 309.

Common Law.

VOYAGE POLICY.

See INSURANCE.

WARRANT OF ATTORNEY.

1. *Attorney of both Parties.*] A warrant of attorney, to confess judgment as a security for advances, was attested in due form by an attorney, acting for defendant and as his attorney, and at his request, but who also acted in the transaction for the plaintiff. Defendant was informed that the attorney had been consulted by plaintiff. The warrant was executed on 6th March, 1847. Judgment was signed on 19th July, 1847, and a *fi. fa.* shortly after issued, but was not executed. The plaintiff, after the judgment was signed, gave fresh credit to the defendant in the way of his trade. On 28th June, 1850, a levy was made. None of these facts were concealed. The defendant was adjudged a bankrupt on 29th July, 1850. A rule to set aside the warrant of attorney and all subsequent proceedings, was obtained in Trinity term, 1851:—

Held, that, by stat. 1 & 2 Vict. c. 110, s. 9, the attorney acting for the plaintiff could not act as attorney for the defendant, and that the objection, being made, must prevail. *Hirst v. Hannah*, 186.

2. *Who may object to.*] *Held*, also, that the circumstances above stated, did not preclude the assignees of the bankrupt defendant from raising the objection. *Ib.*
3. *Waiver.*] *Semble*, that lapse of time after execution levied, and other circumstances showing that the plaintiff was knowingly allowed to alter his position on the faith of a judgment thus obtained, may preclude the defendant or his representatives from raising the objection. *Sed quære. Ib.*

WARRANTY.

1. *Implied — Identity of Article sold.*] The vendor of a bill of exchange impliedly warrants that it is of the kind and description that it purports on the face of it to be. *Gomperts v. Bartlett*, 156.
2. Where, therefore, an unstamped bill of exchange, purporting to be a foreign bill drawn at Sierra Leone, but which had been really drawn in London, was sold, and refused payment by the acceptor:—
Held, that the vendee was entitled to recover back the price of the bill, on the ground of a failure of consideration. *Ib.*

Of Seaworthiness.] See SHIPS AND SHIPPING. INSURANCE.

. See LIFE INSURANCE.

WILLS.

1. *Alterations.*] By the Statute of Wills, 1 Vict. c. 26, s. 1, obliterations, interlineations, or other alterations in a will, after execution, are void, if not affirmed in the margin, or otherwise, by the signature of the testator, and the attestation of witnesses. *Greville v. Tylee*, 53.
2. *Onus probandi.*] The mere circumstance of the amount, or the name of a legatee, being inserted in different ink, and in a different handwriting, does not alone constitute an obliteration, interlineation, or other alteration, within the meaning of the statute, nor does any presumption arise against a will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been superinduced by other writing. In such circumstances, the *onus probandi* lies upon the party who alleges such alteration to have been done prior to execution, to prove, by extrinsic evidence, that the words were inserted before execution, and that they had the sanction of the testator. *Ib.*
3. In the absence of proof, that certain words in a will, written with a different pen and in a different ink, and in a different handwriting, partly upon an erasure, were inserted prior to execution, so much of such will, consisting of the inserted words, which constituted a reversionary disposition, pronounced against. *Ib.*
4. The case of *Cooper v. Bockett*, 4 Moore's P. C. Cases, 419, considered and approved. *Ib.*

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5. Where a will is prepared and written by a medical man or attendant or a secretary, at that time dangerously ill, and without professional advice, in which he is made the principal object of the testatrix's bounty, or the exclusion of her near relations, a court of equity regarding the substance rather than a medical man and patient, will view his conduct with the strictest jealousy. *Id.*
6. *Executory Bequest.*—A, by his will, bequeathed his estate to his daughter M. for her life, and after her decease to her lawful issue, and in default of such issue, to his son G. and his issue. A radical made by the testator, recited that he had bequeathed the household to G. after the death of M. and in default of her leaving lawful issue:—
Held, that the will might be interpreted by the radical, and that the gift over in the will, “in default of issue,” being therefore capable of importing a bequest over on failure of issue living at M.’s death, it ought to be taken in that sense: and that even if the limitation in the will gave an absolute interest to M., there was a good executory bequest over to G. and his issue. *Trotter v. Martin*, 272.
7. *Probate of.*—The party propounding a will is bound to produce all, however numerous, the attesting witnesses, if he asks for publication before the expiration of the term probatory. *Higgins v. Higgins*, 606.
8. *Interlineation.*—In 1847, A regularly executed his will: two years afterwards he made an interlineation in the will, in the margin of which and opposite the interlineation, he and the subscribing witnesses to the will placed their initials:—
Held, that the interlineation was in form part of the probate. *Black v. r.*, 608.
9. *Alteration and Execution.*—See *Id.* *v.* *Mary Brown*, 605.

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